82-1713

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ALEXANDER L. STEVAS,

NO. 82-_____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ELIZABETH A. FRAME, ET AL.,

PETITIONERS,

VS.

SOUTH BEND COMMUNITY SCHOOL CORPORATION, ET AL.,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the free exercise clause of the First Amendment and the equal protection clause of the Fourteenth Amendment permit a school corporation to use religious beliefs and practices as a basis to differentiate as to the quality and extent of bus services it provides to school children, where the school corporation has elected to provide the bus service to school children pursuant to a state statute which authorizes it to extend the service to children who attend public and private schools.

2. Whether the Court of Appeals and District Court should have permitted, through certification or abstention, the courts of Indiana to resolve unsettled questions of state law before resolution of the federal constitutional issues.

PARTIES INVOLVED

The parties involved in this petition are Elizabeth A. Frame; Toni M. Potapow; Mary Ann MacCarthy; Barbara Hartzke; Joseph B. Schopmeyer; John M. Williams; Rosemarie Green, parent petitioners, individually and on behalf of all others similarly situated; Jeffrey A. Frame; Michael G. Potapow; Michael P. MacCarthy; Jennifer Hartzke; Jennifer A. Schopmeyer; Sheila A. Williams; Erin Marie Green, minor petitioners, individually and on behalf of all others similarly situated; and South Bend Community School Corporation; James P. Scamman, Superintendent of the South Bend Community School Corporation; Hollis E. Hughes, Jr.; Donald W. Yates; Eileen T. Bender; Oscar T. Brookins; Anthony V. Luber; William L. Wilson; Loretta Jacobsen, Members, Board of School Trustees of the South Bend

Community School Corporation, respondents.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ELIZABETH A. FRAME, ET AL.,)
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PETITIONERS,)
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VS.)
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SOUTH BEND COMMUNITY SCHOOL)
CORPORATION, ET AL.,)
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RESPONDENTS.)

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

The petitioners, Elizabeth A. Frame, et al., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on November 30, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals

is not reported; it is set forth in Appendix A, pp. 1a-14a. The opinion of the United States Magistrate is not reported; it is set forth in Appendix B1, pp. 15a-62a.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on November 30, 1982. A timely petition for rehearing, suggestion for rehearing en banc and motion to certify state law issues to the Indiana Supreme Court was denied on January 27, 1983. The order appears in Appendix C, pp. 73a-75a. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULE

This case involves: U.S. Const., amend. 1; U.S. Const., amend. 14, §1; 42 U.S.C. §1983; Ind. Const. art. 1,

§2, and art. 1, §23; I.C. 20-8.1-2-1(a), 20-9.1-1-3, 20-9.1-1-4, 20-9.1-2-1, 20-9.1-2-29, 20-9.1-7-1, 22-9-1-2, Ind.R.App.P. 15(O).

The Constitutions, statutes and court rule are set out verbatim in Appendix D.

STATEMENT OF THE CASE

1. Background.

In the past, the South Bend Community School Corporation, acting through the Respondent Superintendent of Schools and his predecessors, and by direction of the School Board, has provided school bus transportation for many children living within the limits of the School Corporation, including many Catholic children attending parochial schools (Plaintiffs' Ex. 1, Complaint, ¶6, Appendix F, pp. 93a-

104a.[1] It is not disputed that the purpose of such bus transportation is to ensure that the children get to school as safely and as expeditiously as possible. Some of the parochial schools attended by these children are located on busy highways.

2. The initiation of the discriminatory policy.

In the Spring of 1981, the respondents informed the petitioners that, in the 1981-82 academic year, the vast majority of school children attending parochial schools who had been receiving transportation would be denied that protection. However, at the School Board's June 15, 1981 meeting, in

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1 Approximately 500-525 Catholic students received such transportation. (Plaintiffs' Ex. 4, p. 609; Plaintiffs' Ex. 6, p. 683; Plaintiffs' Ex. 11.)

response to the protest of the petitioners,[2] the Board strongly suggested that a program providing equal treatment for parochial school students would be established. Indeed, a contingency budget figure of $790,000 was adopted. Moreover, to implement the program, respondents requested that representatives of the petitioners gather information with respect to every child living within the School Corporation who attended parochial school. Petitioners undertook this task and, despite administrative complications, submitted all the requested information to the respondents.[3]

However, at the School Board's meeting of September 8, 1981, the Respondent

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2 Affidavit of Elizabeth A. Frame and Ronald Frame; R. 18a.

3 Id.

Brookins, while expressing reservations about treating one group differently from another, introduced a resolution providing that the parochial school students be transported only on a "space available" basis over existing public school routes even though there were 50 new buses available to transport the parochial school children (Plaintiffs' Ex. 2; Plaintiffs' Ex. 5). School Superintendent Scamman had stated earlier that one view was that providing evenhanded bus service would make parochial schools more attractive (Plaintiffs' Ex. 2, Appendix E, p. 88a). At this meeting, the President of the Board, Mr. Hughes, expressed the fear that, by providing equal transportation service, the public schools would lose students (Plaintiffs' Ex. 2, Appendix E, p. 89a). Board Member

Yates expressed concern for "our competition" (Plaintiffs' Ex. 5, Appendix E, p. 92a). The motion carried by a vote of six to one (Plaintiffs' Ex. 5, Appendix E, p. 92a).

3. The present litigation.

This case was originally filed in the Superior Court of St. Joseph County, Indiana, on September 22, 1981. In their complaint, the petitioners alleged that the action of the School Board violated the Indiana Pupil Transportation Statutes and other state statutes. In essence, they submitted that those statutes (Appendix D, pp. 80a-82a), when read together, require that, when a school corporation determines that the safety of children living within the school corporation requires that transpor-

tation be provided, it must be provided evenhandedly to all children regardless of the school they attend. Additionally, petitioners alleged that they had been denied their free exercise and equal protection rights as guaranteed by Art. 1, §§2 and 23, Indiana Constitution, and Amendments 1 and 14 of the United States Constitution.

On October 5, 1981, the respondents removed the case to the United States District Court for the Northern District of Indiana, South Bend Division, and then filed a motion to dismiss petitioners' complaint for failure to state a claim upon which relief could be granted (Appendix G).

At a subsequent hearing, on petitioners' motion for class certification, preliminary injunction and on respondents'

motion to dismiss, respondents, while acknowledging that they had the responsibility to at least provide parochial school students transportation to the extent permitted by excess capacity aboard existing school buses on existing school bus routes,[4] admitted that they had not done so (TR. pp. 6, 7, 49, 87).

Subsequent to this hearing, the respondents proposed to permit some parochial school students to ride the school bus bound for the public schools over previously established routes. However, the parents of these children would be required to sign a waiver of liability, releasing the School Corporation from any liability should the child be injured while riding on the school bus or in

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4 Thomas E. Reidy Affidavit, ¶2; R. 16.

walking from the drop-off point to the parochial school involved (Ex. F-2 and F-3 to Reidy Aff.; R. 16). Parents of children attending public schools are not required to sign a waiver of liability as a condition precedent to their child being allowed to ride the school bus (Elizabeth A. Frame Aff.; R. 15a; Toni M. Potapow Aff.; R. 15b).

4. The decision of the Magistrate.

The United States Magistrate[5] granted the respondents' motion to dismiss the complaint. Relying heavily on a section of the state busing statutes that exempted

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5 The District Judge, after hearing the evidence submitted at the October 15, 1981, hearing, recused himself because he had children attending parochial school. By agreement of the parties, the case was referred to a United States Magistrate for trial as authorized by 28 U.S.C. §636.

school buses owned by private schools and school bus driver contracts executed with private schools from complying with certain sections of the statutes, he held that Indiana law only required that parochial school children be given school bus transportation if they lived on or along the regularly established school bus route to the public school and, then, only if they could be accommodated on available extra seats.[6] With respect to the federal constitutional issues, the Magistrate held that his interpretation of the Indiana statutes was permissible. He relied on this Court's summary affirmance in Luetkemeyer v.

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6 The Magistrate relied on no decision of an Indiana Court directly supporting his interpretation of the statutory scheme.

Kaufmann, 419 U.S. 888 (1974), and suggested that Norwood v. Harrison, 413 U.S. 455 (1973), had "clarified the 'child benefit' theory" of Everson v. Board of Education, 330 U.S. 1 (1947) (Appendix B1, p. 54a).

The Seventh Circuit affirmed the Magistrate as to the dismissal of the federal claims, but reversed the disposition of the state law claims[7] and directed that the state law claims be remanded to the state trial court where petitioners had originally filed this case (Appendix A, pp. 1a-14a).

In the petition for rehearing, the

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7 Apparently the Court of Appeals' reference to the state law claims refers to the respondents' admitted unfulfilled minimal obligation to permit parochial school students to ride the public school bus on a space available basis.

Seventh Circuit was asked to certify all the state law questions to the Indiana Supreme Court, as authorized by Ind.R. App.P. 15(O). The Seventh Circuit denied the petition for rehearing and motion to certify the state law questions on January 27, 1983 (Appendix C, pp. 73a-75a).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court.

At the outset, it is important to note that this case does not raise the issue of whether school bus transportation for students attending parochial schools violates the Establishment Clause. In Everson v. Board of Education, supra, this Court recognized that a state could afford such protection to its young citi-

zens regardless of their parents' choice of educational facility. Indeed, by statute,[8] Indiana has authorized local school corporations to provide such assistance, and the respondents, prior to 1981, undertook to provide such protection. Even since 1981, they have undertaken to provide some protection to some members of the class. However, they have discriminated as to the quality and extent of those services on the basis of the parents' choice -- based on religious belief -- of educational facility. In

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8 Other states with similar statutes are:

Ohio Rev.Code Ann. §3327.011 (Page 1967);
Mich.Stat.Ann. §15.4141 (Callaghan 1981);
Minn.Stat.Ann. §123.76, et seq. (West 1969);
24 Pa.Cons.Stat.Ann. §13-1361 (Purdon 1979);
W.Va.Code §18-5-13(6) (1981).

short, in South Bend, Indiana, the School Corporation has decided that the child attending a public school is worthy of more taxpayer protection from the hazards of traffic and climate than the child whose parents have chosen a religious school.[9]

Discrimination based on religious preferences is subject to strict judicial scrutiny, Kramer v. Union Free School District, 395 U.S. 621 (1969). Here, the Court of Appeals and the District Court

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9 This decision of the School Corporation cannot be explained away on the ground that government officials have simply made a decision as to the most effective use of available funds. Cf. Dandridge v. Williams, 397 U.S. 471, 485-487 (1970). Here, the funds had been allocated, buses were available (Appendix E, pp. 89a-90a) and there is evidence that the School Board took its discriminatory action in order to burden the religiously-based choice of the petitioners (Appendix E, pp. 89a-92a).

apparently tolerated this discrimination on the basis of religion because they characterized school bus transportation as an assistance to the parochial school rather than as the provision of a safety service to individual citizens.[10] Conse-

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10 Both the Magistrate and the Court of Appeals relied heavily on Norwood v. Harrison, 413 U.S. 455 (1973). In Norwood, this Court struck down text book loans to students attending private schools with racially discriminatory policies on the ground that such assistance amounted to a form of tangible financial assistance benefiting the schools themselves. The Norwood Court was emphatic, however, in distinguishing its earlier holding in Everson v. Board of Education, supra, noting that even if certain forms of assistance to individuals such as textbooks (significantly, the Court did not mention school bus transportation) could be characterized as indirect aid to sectarian schools, Cf. Board of Education v. Allen, 392 U.S. 236 (1968), the "leeway for indirect aid to sectarian schools has no place in defining the permissible scope of state aid to private

quently, they appear to reason, countervailing establishment clause concerns permit the School Corporation to "withdraw from the verge," (Appendix B1, pp. 56a-57a) of impermissible aid to parochial schools.[11] In Everson v. Board

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racially discriminatory schools," 413 U.S. at 464, n. 7. This Court has adhered to this distinction in cases subsequent to Norwood. See, e.g. Meek v. Pittenger, 421 U.S. 349, 359-62 (1975).

11 The Magistrate and the Court of Appeals relied upon and, indeed, seemed to believe themselves bound by Luetkemeyer v. Kaufmann, supra. Summary affirmances are not binding on this Court. Edelman v. Jordan, 415 U.S. 651, 671 (1974); see also Fusari v. Steinberg, 419 U.S. 379, 391 (Burger, C.J., concurring). Moreover, Luetkemeyer dealt with a significantly different situation. There, the Legislature of Missouri had not undertaken to provide any transportation to any parochial school children on the grounds that the Missouri Constitution involved an interest in "maintaining a very high wall between

of Education, supra, this Court made it clear that providing such protection to children is not assistance to the school which they attend. The primary purpose and effect of school bus transportation is to ensure that children are protected from the hazards of traffic and weather (usually a significant problem for most of the school year in the area). Moreover, with respect to the potential for religious-based discord in the community, it is obvious that it is discrimination

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church and state," 364 F.Supp. 376 (W.D.Mo. 1973). It is doubtful that Luetkemeyer could be decided on the same rationale today. See Widmar v. Vincent, 454 U.S. 263, 275 (1982). In any event, here the Indiana Legislature has evidenced no independent state interest in maintaining such a "very high wall." Indeed, it has authorized such assistance to children attending parochial schools (Appendix D, pp. 80a-87a).

on the basis of religion in providing safety services -- not evenhandedness in delivery -- which brings the very real possibility for such a problem. Cf. Widmar v. Vincent, supra.

Furthermore, the discriminatory action of the respondents directly burdens the free exercise rights of the petitioners. Petitioners, as a matter of their religious belief, have chosen to send their children to parochial schools.[12] Here, the respondents are directly burdening that right by withholding a state-provided safety service unless the petitioners conform to the

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12 Freedom of choice with respect to the education of one's children is protected even when that choice is not based on religious belief. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

government's will and send their children to public school. Moreover, this is not a case in which the free exercise complaint is premised simply on the effect of government action -- however well intentioned that government action may have been. See e.g. Thomas v. Review Board of Indiana Employment Sec., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972). Here, it is clear that the respondents chose to force petitioners' children to make their own way through the snow to school as an incentive to get parochial school children to transfer to the public schools. This motive is evidenced by comments made by the respondents in the course of their public meetings.[13] For instance, School Superin-

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13 These statements were received in

tendent Scamman stated that providing bus transportation makes parochial schools more attractive (Appendix E, p.

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evidence by Judge Sharp during the October 15, 1981, hearing on a preliminary injunction. In their brief in the Court of Appeals, respondents contended that these statements were not properly before the Court since Magistrate Lee had, in a subsequent unreported status conference, stated he would not be bound by evidence submitted at the October 15, 1981, hearing in ruling on respondents' motion to dismiss. Petitioners, in their reply brief in the Court of Appeals, took sharp issue with respondents' rendition of the status conference, noting that the Magistrate, in asserting that " . . . the defendants have repeatedly averred their intent to continue to provide such transportation (seats available busing only) . . . , " necessarily considered evidence presented at the October 15, 1981, hearing and, therefore, should have considered the motion as one for summary judgment. The Court of Appeals acknowledged that evidence had been offered by plaintiffs (Appendix A, p. 7a).

88a). School Board President Hughes feared that, by providing equal transportation service, the public schools would lose more students (Appendix E, p. 89a). Board Member Yates expressed concern for "our competition" (Appendix E, p. 92a). If, in an effort to avoid declining school enrollment, the benefits of public welfare legislation" are to be withheld from those who do not choose a government education, the State will indeed have become the "adversary" of religion and of those who wish to freely exercise their beliefs.

2. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the Magistrate as to call for an exercise of this Court's power of supervision.

The Indiana statutes with respect

to school bus transportation are contained in many sections of the Code. There has been no relevant interpretation of those Code provisions by the courts of Indiana.

Petitioners originally brought this action in the Indiana state court. The state court could easily have given the Indiana statutory scheme an interpretation which would have avoided the necessity of reaching the federal constitutional question. In essence, petitioners took the position that the Indiana statutory scheme, read in its entirety, required that school bus transportation be afforded all children, regardless of the school they attended -- parochial, private or public. They submitted that one ought not to conclude that the Indiana Legislature would act

irrationally by permitting a school corporation to fulfill a safety function through busing arrangements whereby parochial school children would be picked up and dropped off significant distances from their homes and schools and left, despite their ages, to cope with the hazards of climate and traffic. Upon removal to the District Court, the Magistrate, without the benefit of any state judicial construction of the statutory scheme, construed the state statute to permit such discrimination and proceeded to resolve the federal questions.

The Court of Appeals not only sanctioned this ad hoc determination of state law but also, despite the existence of an established certification procedure, declined to seek

guidance from the Supreme Court of Indiana as requested by petitioners.[14]

Here, where state social policy is so critical to the dispute, the ends of justice and the principles of federalism can only be served by permitting the state courts to determine what state law means. Railroad Comm. of Texas v. Pullman Co., 312 U.S. 496

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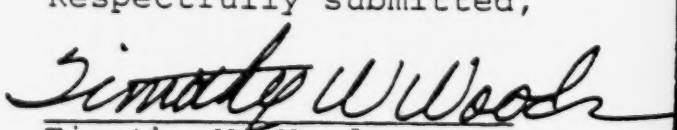
14 This Court should certify the state law issues to the Indiana Supreme Court, Ind.R.App.P. 15(O), (Appendix D, p. 85a). Even if the state law questions are not certified, this Court, on its own motion, should remand this case to the District Court and direct that it abstain from deciding the federal issues until the state courts have been given an opportunity to interpret the state statutes involved here. Bellotti v. Baird, 428 U.S. 132 (1976); Albertson v. Millard, 345 U.S. 242 (1953); City of Chicago v. Fieldcrest, 316 U.S. 168 (1942).

(1943); Burford v. Sun Oil Co., 319 U.S. 315 (1943). By resolving the state law question in this case without permitting the state courts to interpret the state statutes, the courts below have intruded in an unwarranted manner into state law issues and have decided federal constitutional questions when an authoritative pronouncement of the state law issues could have eliminated or greatly changed the federal questions.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX A

ORDER OF THE COURT OF APPEALS

OF NOVEMBER 30, 1982

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604
(Argued September 13, 1982)

November 30, 1982

Before

HON. WILLIAM J. BAUER, Circuit Judge

HON. PAUL C. WEICK, Senior Circuit Judge*

HON. RICHARD D. CUDAHY, Circuit Judge

ELIZABETH A. FRAME, et al., Plaintiffs-Appellants,	)	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 82-1383 vs.	)	
SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al., Defendants-Appellees.	)	Civil No. 581-0344 Gene B. Lee, Magistrate.

O R D E R

This appeal is from an order of the

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* The Honorable Paul C. Weick, Senior Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.

district court granting the defendants' motion to dismiss the complaint for failure to state a claim upon which relief may be granted and entering judgment dismissing the complaint. We affirm in part and reverse in part.

The action was filed originally in the Superior Court of St. Joseph County, Indiana. It was removed by the defendants to the Federal District Court for the Northern District of Indiana, South Bend Division. It was certified as a class action by the district court and by agreement of the parties was referred by the court to a United States Magistrate for trial as authorized by 28 U.S.C. § 636.

The plaintiffs in the action were parents and their children who were attending private Catholic parochial

schools in the jurisdiction of the School Corporation. The defendants were the South Bend Community School Corporation, the Superintendent of the School Corporation and the members of its Board of Trustees.

The plaintiffs sought a declaratory judgment to the effect that the failure of the School Corporation to furnish free transportation by bus to the children attending their parochial schools, violated not only the Constitution and statutes of Indiana, but also the Constitution of the United States, particularly the Fourteenth Amendment and the Civil Rights Act of 1871, 42 U.S.C. 1983. The complaint sought a mandatory injunction to require the transportation on equal terms with public school children and

prayed for damages.

The defendants in their motion to dismiss for failure to state a claim upon which relief could be granted, stated in paragraph 2 thereof:

> '2. The defendants are willing to provide transportation to that number of non-public school students who can be accomodated [sic] in school buses already in operation over regularly established routes for the reason that the laws and the Constitution of the State of Indiana and the Constitution of the United States require them to do no more.'

Thus, plaintiffs were not denied all rights to transportation. They claimed to have the same rights as public school children and that their constitutional rights were thereby violated.

The Magistrate gave careful consideration of the issues in the case in a 17 page Memorandum & Order. There was no dispute between the parties that all children living in the school district were entitled to be transported to the public schools in the school district irrespective of their race or religion. The controlling issue here is whether children attending private Catholic parochial schools were entitled to be transported at taxpayers' expense to their own private schools the same as public school children.

The Magistrate held that no rights of the plaintiffs under the Fourteenth Amendment to the Constitution of the United States had been violated. He relied on Norwood v. Harrison, 413 U.S. 455, 462 (1973), that the state could withhold all assistance; Luetkemeyer v. Kaufmann, 364 F. Supp. 376, affirmed in 419 U.S. 888 (1974); Brusca v. State of Missouri, 332 F. Supp. 275, affirmed 405 U.S. 1050 (1972). The Magistrate also held that the transportation permitted by the School Corporation was authorized by state law and its Constitution, and no rights of the plaintiffs under the Constitution had been violated.

Although plaintiffs offered some evidence, it must be remembered that the Magistrate disposed of the case solely by granting defendants' motion

to dismiss the complaint. The only question involved was one of law, that is, whether the complaint stated a claim upon which relief could be granted. The Magistrate held that the complaint did not state such a claim and, in our opinion, based upon the decisions of the Supreme Court on which the Magistrate relied, he was correct.

The Magistrate was also correct in denying plaintiffs' motion for a new trial, to make findings of fact, and to amend the judgment of dismissal to include a mandatory injunction requiring the defendants to furnish transportation to parochial school children the same as furnished to public school children as required by Indiana law. When the Magistrate dismissed the federal claims, he did not abuse his discretion in de-

clining to exercise pendent jurisdiction to decide claims under state law, relying on United Mine Workers v. Gibbs, 383 U.S. 715 (1966). Nor did the Magistrate err in denying both parties' motions for attorney's fees.

We reverse, however, the ultimate disposition of the state law claims. Instead of dismissing these claims once it had decided that pendent jurisdiction would not be exercised, the district court should have remanded the state law claims to the state court. Though United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966), states, 'if the federal claims are dismissed before trial, . . . the state claims should be dismissed as well,' one must read this in light of the fact that in Gibbs the plaintiff had brought his claim in federal court

so that there was no alternative to dismissing the state law claims. The same is true of the case cited by the Gibbs Court in support of the language quoted above. Gibbs, 383 U.S. at 726 n. 16, citing Wham-O-Mfg. Co. v. Paradise Manufacturing Co., 327 F.2d 748, 749 (9th Cir. 1944). Plaintiffs here, however, brought their action in state court.1/ The case reached federal court via the defendants' removal petition. In this context, we see no purpose in re-

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1/ The Court in Gibbs was concerned with plaintiffs trying to misuse the federal forum to litigate essentially state law actions. '[R]ecognition of a federal court's wide latitude to decide ancillary questions of state law does not imply that it must tolerate a litigant's effort to impose upon it what is in effect only a state law case.' Gibbs, 383 U.S. at 727.

quiring plaintiffs to file anew in state court; fairness dictates a remand. Till v. Unifirst Federal Savings and Loan Ass'n, 653 F.2d 152, 162 (5th Cir. 1981), Ondis v. Barrows, 538 F.2d 904, 908 (1st Cir. 1976). Requiring a refiling means that plaintiffs' case would have a lower priority upon its return to the state court system. Also, though apparently not a problem here, statute of limitations issues could arise if remand is not used. See also Brough v. United Steelworkers of America, AFL-CIO, 437 F.2d 748, 750 (1st Cir. 1971), J. Moore, 1A Moore's Federal Practice ¶ 0.169[1] at 561 n.33, 'The purpose of removal jurisdiction is to give a defendant, in certain cases, a right to trial in a federal forum, not a means of escaping trial in both the state and federal

forums.'

The judgment entered in the district court is therefore affirmed in part and reversed in part. The case is remanded for further proceedings consistent with this order.

Unpublished Per Curiam Order

JUDGMENT - ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

November 30, 1982

Before

HON. WILLIAM J. BAUER, Circuit Judge

HON. PAUL C. WEICK, Senior Circuit Judge*

HON. RICHARD D. CUDAHY, Circuit Judge

ELIZABETH A. FRAME, et al., Plaintiffs-Appellants,	)	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division
No. 82-1383 vs.	)	
SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al., Defendants-Appellees.	)	Civil No. 81-344 GENE G. LEE, Magistrate

This cause was heard on the record

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* Honorable Paul C. Weick, Senior Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.

from the United States District Court for the Northern District of Indiana, South Bend Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED IN PART AND REVERSED IN PART, and the cause is REMANDED, in accordance with the order of this Court entered this date. Each party is to bear its own costs on appeal.

APPENDIX B1

DISTRICT COURT'S ORDER OF DISMISSAL

OF JANUARY 18, 1982

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

ELIZABETH A. FRAME, et al.,

Plaintiffs,

vs. CIVIL NO. S81-0344

SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al.,

Defendants.

MEMORANDUM AND ORDER

This suit was originally filed on September 22, 1981, in the St. Joseph County Superior Court. The complaint seeks a declaratory judgment that the failure to provide transportation for parochial students to and from school on equal terms with public school students is contrary to Indiana's compulsory school attendance and pupil transportation laws, the federal Civil Rights Act of 1871, 42 U.S.C. §1983,

and both state and federal constitutional guarantees. The complaint seeks a mandatory injunction requiring that transportation be provided on equal terms, and damages under §1983. On October 5, 1981, the defendants procured the removal of this action to Federal Court. No petition for remand was filed. This cause was certified as a class action by order dated October 21, 1981, and was referred to the United States Magistrate for all further proceedings by order dated November 6, 1981.

The defendants herein move to dismiss the complaint on the grounds that they are willing to provide transportation to all non-public school children who can be accommodated in school buses already in operation over regularly established routes. They contend that

under the law of Indiana and under the Constitutions of both Indiana and the United States, no more is required of them. In response, the plaintiffs argue that Indiana law and public policy entitles parochial school children to transportation on the same terms and conditions as public school children, and that any other interpretation would conflict with Indiana and United States Constitutional guarantees.

The class certified in this cause includes the named plaintiffs and all parents whose children now or in the future attend a Catholic parochial school located within the jurisdiction of the South Bend Community School Corporation and all school children who now attend or who in the future attend Catholic parochial schools

within the jurisdiction of the South Bend Community School Corporation. The plaintiffs' claims for injunctive relief were certified under Federal Rules of Civil Procedures 23(b)(2), and the parent plaintiffs' claims for monetary relief were certified under Federal Rules of Civil Procedures 23(b)(3). Central to all claims is the issue raised in the defendants' Motion to Dismiss of whether the defendants are under a duty, statutory or constitutional, to provide transportation for parochial school children on equal terms with public school children. Consistent with the policy of treating as (b)(2) actions those maintainable as both (b)(2) and (b)(3) class actions,[1] the Court will

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1 See Elliot v. Weinberger, 564 F.2d

not require notice prior to resolution of this issue:

> Such a course promotes both ease of administration and the underlying principles of Rule 23. If the union is successful in the final analysis, the class will be bound, and all members of the class will be precluded from any claim of the same nature (though, of course, claims of limited specified

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1219, 1229 N.14 (9th Cir. 1977); Wetzel v. Liberty Mutual Insurance Company, 508 F.2d 239, 253 (3rd Cir. 1975); Bing v. Roadway Express, Inc., 485 F.2d 441, 447 (5th Cir. 1973); Van Gemert v. Boeing Company, 259 F.Supp. 125, 130-31 (S.D.N.Y. 1966). 3B MOORE'S FEDERAL PRACTICE ¶23.31 [3] (2d ed. 1981).

individual discrimination would not). In the final analysis if plaintiffs are successful, then the court would proceed with the monetary awards which might be due the individual members. This would necessitate notice to all members of the class under rule 23(b)(3).

White v. Local 207 of Laborers' International Union of North America, 387 F.Supp. 53, 54-55 (W.D.La. 1974). All members of the (b)(3) class are members of the (b)(2) class, and their positions regarding the Motion to Dismiss are identical. As members of the (b)(2) class, they have no right to 'opt out' and would be bound by this Court's

decision on the pending motion, favorable or unfavorable. Air Line Stewards & Stewardesses Ass'n, Local 550 v. American Airline, Inc. 490 F.2d 636, 642 (7th Cir. 1973) cert. denied sub nom. Air Line Stewards & Stewardesses Ass'n, Local 550 v. Sipes, 416 U.S. 993, 94 S.Ct. 2406, 40 L.Ed.2d 773 (1974). There is no danger of 'one-way intervention' under these circumstances. Compare Shane v. Northwest Industries, Inc., 49 F.R.D. 46, 47 (N.D.Ill. 1970) (Striking as untimely precertification motion for summary judgment on named plaintiffs' individual claims), with White v. Local 207 of Laborers' International Union of North America, supra, 387 F.Supp. at 54-55.

Notice to (b)(2) class members is required only if special circumstances

indicate that the interests of due process require more than the protections inherent in the certification procedure. See Redhail v. Zablocki, 418 F.Supp. 1061, 1066-67 (E.D. Wis. 1976), affirmed 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), and the authorities cited therein. Such special circumstances are suggested in Rule 23(d)(2), which provides that notice may be given class members so that they might 'signify whether they consider the representation fair and adequate,... intervene and present claims or defenses, or otherwise... come into the action.' See Redhail v. Zablocki, supra, 418 F.Supp. at 1067-68. In the present case, such intervention would be more productive of delay and procedural complications than of benefit to the proceedings.

There are no factual disputes material to the issues raised by the defendants' Motion to Dismiss. Those issues are of statutory construction and constitutional law only, and have been thoroughly briefed. The named plaintiffs' interest are precisely identical to those of the class members, and there is no question of the competency of plaintiffs' counsel. It appears that the class members could accomplish nothing by taking active part in these proceedings that has not already been done on their behalf. In such circumstances, notice is not required. See Elliott v. Weinberger, 564 F.2d 1219, 1228-29 (9th Cir. 1977) reversed in part on other grounds sub non. Califano v. Yamasaki, 442 U.S. 682, 99 S.Ct. 2545, 60 L.Ed.2d 1063 (1979);

and Souza v. Scalone, 563 F.2d 385, 386 (9th Cir. 1977).

Upon thorough consideration of the parties' positions respecting the Motion to Dismiss, the Court concludes as set out hereinafter that the motion should be granted.

I

In the absence of an express statutory directive, there is no duty to provide free transportation for school children under Indiana law. State ex rel. Beard v. Jackson, 168 Ind. 384, 81 N.E. 62, 64 (1907); Nelson v. State, 168 Ind. 491, 81 N.E. 486 (1907). General authority to provide such transportation presently exists in I.C. 1971, 20-9.1-2-1 and -2, which provide that the governing body of each school corporation may provide transportation for

school children and that the school corporation is responsible for procuring the necessary buses and drivers. Because the statutory definition of 'school children' expressly includes children enrolled in private schools, I.C. 1971, 20-9.1-1-4, the plaintiffs contend that these provisions require transportation of parochial school children on equal terms with public school children. This interpretation is foreclosed however by I.C. 1971, 20-9.1-2-29, which provides that none of the sections in that chapter, including I.C. 1971, 20-9.1-2-1 and -2, shall have application to any private school or to any school bus driver contract executed for a private school.

A review of Article 9.1 on Pupil Transportation as a whole discloses many indications that the legislature

contemplated private schools would provide their own transportation services. See, e.g. I.C. 1971, 20-9.1-3-7 (requiring attendance at annual safety meeting); I.C. 1971, 20-9.1-4-5 (1981 Supp.) (annual inspection of buses); I.C. 1971, 20-9.1-5-1 (1981) Supp.) (limiting use of school buses). Such an exercise is unnecessary, however. The Court would not endeavor to infer from these various safety provisions an unexpressed intent to provide transportation on equal terms for parochial school children where a specific provision addressing the question imposes express limitations. See Brown v. Gardner, 159 Ind.App. 586, 308 N.E.2d 424, 427 (1974) quoting Garvin v. Chadwick Realty Corp., 212 Ind. 499, 9 N.E.2d 268, 273 (1937).

Provision for transportation of parochial school children is made in I.C. 1971, 20-9.1-7-1, which states:

> When school children who are attending a parochial school in any school corporation reside on or along the highway constituting the regular route of a public school bus, the governing body of the school corporation shall provide transportation for them on the school bus. This transportation shall be from their homes, or from some point on the regular route nearest or most easily accessible to their homes, to and from the parochial school or to and from the point on the regular route which is nearest or most easily accessible

to the parochial school.

The limitation to regular routes of public school buses is unambiguous and not uncommon. See, e.g., Alaska Statutes §14.09.020 (S.L.A. 1972, chap. 157, §1) and A.C.L.A. cum.supp. 1958, §37-11-5; Calif. Educ. Code § 39808 (1976) and §16257 (1943); Oklahoma Statutes, Title 70 §1196 (1941); Washington, Laws of 1941, chap. 53 §2 p. 120. See also Fox v. Board of Education of the Township of West Milford, 93 N.J.Super. 544, 226 A.2d 471 (1967), construing a similar limitation in N.J.S.A., 18:14-8. Whether the Indiana statute's phrase 'on the school bus' is intended to impose an additional limitation is not entirely clear on the face of the enactment, however. Compare Laws of Maryland 1937,

chap. 185, adding §§146A and 146B to Public Local Laws of Baltimore County, which includes a similar phrase 'on the said buses or conveyances' but also expressly provides that transportation be 'upon the same terms and conditions as now or as may be hereafter established... for children attending public schools.' In Board of Education of Baltimore County v. Wheat, 174 Md. 314, 199 A. 628 (1938) construing this law, the Court expressly noted that '[i]t is not a use of surplus space that is provided for, within the principle applied in permitting private use of schools and other public buildings.... It is a use without regard to extra space, and money is to be provided by the taxpayers for an expected expense from it.' Id., 199 A. at 630-31. It must be noted

however, that the legislature of Maryland in other instances had imposed just such a limitation. Laws of Maryland 1933, chap. 447, and Laws of Maryland 1935, chap. 28, expressly limit transportation of non-public school children in St. Mary's County to those occasions where they may be accommodated on school buses already provided for public school children. With such enactments for comparison and express provisions for equal privileges, the legislative intent was clear.

Unlike the Maryland law construed in Fox, the Indiana law makes no special provision for funding of any additional expense. Cf. I.C. 1971, 20-9.1-7-2 and -3 (costs of transporting children living on State-owned property and certain high school pupils to be paid

out of the general fund of the State and out of special school funds, respectively). This is some indication the Indiana legislature did not contemplate that any additional expense would be incurred in providing transportation for parochial school children under the terms of I.C. 1971, 20-9.1-7-1. A review of the history of such provisions in Indiana law confirms this view.

In 1921, a bill was enacted authorizing the transportation of school children. As indicated by the title of that Act, such transportation was exclusively for children attending public schools. Acts of 1921, chap. 253, §2, p. 743. In 1933, that Act was amended to provide 'for the transportation of children to parochial schools in certain cases....' Acts of 1933, chap. 54, §2,

p. 414. The 1933 enactment added the following language to the original act:

> Where school children who are attending any parochial school in any school corporation of this state reside on or along the highway constituting the regular route of a public school bus or conveyance, the school trustee shall afford transportation, without extra charge, by means of such school bus or conveyance, for the children attending any such parochial school, from their homes, or from some point on the regular route nearest or most easily accessible to their homes, to such parochial

> school, or to the point on such regular route which is nearest or most easily accessible to such parochial school.

Burns' Ann. Stat. §28-2805 (1948 Repl.).

An official opinion issued by the Indiana Attorney General regarding the 1933 enactment opined that the act 'neither requires nor authorizes the school trustee or trustees to place any additional bus on the route in order to accommodate parochial pupils otherwise eligible for transportation.' 1936 O.A.G. p. 415, 416. The Attorney General relied upon the phrase 'by means of such school bus or conveyance' in reaching this conclusion:

> The phrase last quoted obviously refers to the school

bus or conveyance already being operated over such regular, established route....

Apparently the legislature only intended to extend the privilege of free transportation to parochial pupils where they could be accommodated in the bus or conveyance already in use on such regular route, as otherwise there would have been no purpose in inserting the limiting phrase.... Conversely, if the legislature had intended to impose an unqualified duty on the respective school trustees

> to afford transportation for parochial school children, regardless of whether or not additional busses would be required for such purpose, then this result would have been accomplished simply by omitting the phrase in question.

Id., at 416. The Attorney General may have had a similar Illinois statute in mind in regard to the latter remark. In the same year that Indiana first provided for transportation of parochial school children in certain cases, Illinois enacted a strikingly similar statute which did not include the particular phrase which the Attorney General found significant in the Indiana Act:

In case children who attend any school other than a public school reside on or along the highway constituting the regular route of any public school, bus or conveyance provided by any school district for transporting pupils to and from the public schools, the board of directors or board of education of such district shall afford transportation, without extra charge, for such children from their homes, or from such point on the regular route nearest or most easily accessible to their homes to such school, other than a public school,

or to the point on such regularl route which is nearest or most easily accessible to such school.

Illinois Laws of 1933, p. 1048 §1 (emphasis added). The present version, Ill. Rev. Stat. 1971, chap. 122, para. 29-4, has been held to require the purchase of additional buses in order to accommodate non-public school children residing along established routes. Board of Education, School District No. 142 v. Bakalis, 54 Ill.2d 448, 299 N.E.2d 737 (1973). In holding the provision constitutional, the court noted that this had been the practice since 1933.

In 1965 the Indiana Legislature enacted the School Transportation Code, Acts 1965, chap. 260, §§101-910, p. 663,

found in Burns' Stat. Ann. §§28-5101 - 28-5151 (1970 Repl.). This Code, in nine Articles, granted general authority to transport school children and established requirements relating to bus driver contracts, qualifications and compensation of bus drivers, safety regulations and inspections by a State School Bus Committee. Among the miscellaneous provisions is §28-5143. The language of that provision is nearly identical to the earlier provision for transportation of parochial school children found in Burns Stat. Ann. §28-5002 (1970) Repl.) (deleting 'or conveyance' in two instances, substituting 'the governing body of such school corporation' for 'the school trustee,' and adding 'and from' to the last clause referred to 'such parochial

schools' and 'the point on such regular route.'). According to the Report of the Commission to Recodify School Transportation Laws,[2] the paramount objective of the codification was safe, efficient transportation:

> It was the commission's belief that the safety of all Hoosier school children should be insured by requiring every school bus - regardless of the nature of the institution it serves - to comply with safety and inspection regulations. Private schools are, however, excluded from

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2 The Commission was created by Indiana Acts 1963, chap. 414.

most stipulations outside of these areas....

Report, at 178 (original emphasis).[3] With regard to provision of transportation, the Commission stated that '[t]he situation vis a vis the avail-

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3 In relation to the policy underlying school transportation law, the plaintiffs refer to I.C. 1971, 20-8.1-2-1(a), which provides that the public policy in Indiana is '[t]o provide, furnish and make available equal, nonsegregated, nondiscriminatory educational opportunities and facilities for all regardless of race, creed, national origin, color or sex.' That (sic) specific duties imposed by that chapter indicate however that the above public policy is to be implemented by the establishment of a public school system, open to all, in which segregation has no place. Viewing that stated policy in the context of the whole chapter, it cannot be construed as contemplating the provision of equal benefits to those who choose not to avail themselves of those educational opportunities and facilities.

ability of public school buses to parochial school students will remain exactly the same as it is under today's laws.' Report, at 179. It is apparent that 'today's laws' as contemplated by the Commission was correctly interpreted by the Indiana Attorney General in 1936 O.A.G. p. 415, previously quoted herein. See 1964 O.A.G. No. 12, p. 44, in which the Chairman of the Commission sought an opinion as to the advisability of further clarification of the provision in question. It is clear then that the School Transportation Code of 1965 was not intended to require transportation of parochial school children on equal terms with public school children, and that the Code was intended to require transportation of such children only when they could be accommodated on

public school buses already in operation.

Indiana law regarding school transportation was again recodified in Indiana Acts 1973, P.L. 218. This is the present Code found in Title 20, Article 9.1. The most cursory review discloses that it is closely modeled on the Code of 1965, in both form and substance.[4] Most of the language is retained in the new Code. Compare, e.g., I.C. 1971, 20-9.1-2-1 with Burns Ann. Stat. §28-5103 (1970 Repl.); I.C. 1971, 20-9.1-2-2 and -3 with Burns Ann. Stat. §28-5104 (1970 Repl.). Like the Code of 1965, the

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4 See Acts of 1973, P.L. 218, §6(a), stating that '[t]he provisions of this act are intended to be a codification or restatement of applicable or corresponding provisions repealed by this act.

present law regulates school corporation contracts for providing transportation and exempts private schools. Compare I.C. 1971, 20-9.1-1 to -29, with Burns Ann. Stat. §§28-5103 to 28-5118 (1970 Repl.). Safety measures relating to buses and drivers' qualifications are established and inspections provided for, from which private schools are not exempt. Compare I.C. 1971, 20-9.1-3-1 to -11 and 20-9.1-4-1 to -10 with Burns Ann. Stat. §§28-5119 to 28-5129 (1970 Repl.). Compare also, I.C. 1971, 20-9.1-5-10 to -20 with Burns Ann. Stat. §§28-5134 to 28-5142 (1970 Repl.) (relating to safety in the operation of school buses). If any alteration of the law regarding transportation of parochial school children was intended, no sign of it appears in the above-

mentioned chapters. Indeed, it appears in the face of these fundamental similarities that the Indiana legislature acted with the same objectives in enacting the 1973 Code as it did in enacting that of 1965: that is, to promote the safety of school children by establishing standards for the qualifications of drivers and conditions of buses.

As did the Code of 1965, the Code of 1973 provides for transportation of parochial school children in a separate chapter. The 1965 Code included this section under the Title of Misecellaneous Provisions. The 1973 Code removed every other section formerly under this heading to chapters evidently deemed more appropriate.[5] The provision respecting

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5 Burns Ann. Stats. §§28-5145 and

parochial school children appears under the heading of Transportation Costs. The present language differs somewhat from the language of the Code of 1965. It is now in two sentences. The second sentence is identical to the earlier language except that 'the' is substi-

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28-5148 are to be found in the State School Bus Committee chapter as I.C. 1971, 20-9.1-4-10 and 20-9.1-4-9, respectively. Under the present School Bus Safety chapter, Burns Ann. Stats. §§28-5146, 28-5417, 28-5149, 28-5150, and 28-5151 are now I.C. 1971, 20-9.1-5-18 to -22. I.C. 1971, 20-9.1-5-21, was repealed by Acts of 1975, P.L. 237, §4. The Court does not agree with the plaintiffs' interpretation of this repeal. Since Acts of 1975, P.L. 237, §2 amends the Code to allow parents of public school children to provide transportation, a provision allowing only public school corporations, private schools and public carriers to compensate school bus drivers is no longer appropriate, and would be conflicting if allowed to stand.

tuted for 'such' in two instances. The most visible change is in the first sentence where 'shall provide transportation for them on the school bus' is substituted for 'shall afford transportation, without extra charge, by means of such school bus.' The inclusion of the phrase 'on the school bus' is equally amenable to the interpretation placed on the former language by the Indiana Attorney General in 1936 O.A.G. p. 415. 'The school bus' refers to 'a public school bus' along the regular route of which parochial school children must reside in order to be eligible for transportation. The phrase could have been omitted entirely if the legislature had not intended that it operate as a limitation. It is apparent that the Indiana Attorney General perceived

nothing in the 1973 version warranting an alteration in the 1936 interpretation. See 1980 O.A.G. No. 80-31, at p. 98. This supposition is borne out by the legislature's necessary awareness that the phrase 'on the bus' would inevitably be construed in this manner; the legislature had acquiesced in this reasoning for thirty-seven years at the time the 1973 enactment was passed.

In summary, Indiana law does not provide for transportation of parochial school children upon equal terms with public school children. The language of the statute, its history in the law of Indiana, and forty-five years altogether of consistent interpretation, necessitate this conclusion. A school corporation need only supply transportation when eligible parochial school children

can be accommodated on public school buses already in operation for the benefit of public school children.

II

The plaintiffs claim that the failure to provide transportation for parochial school children on equal terms with public school children deprives them of equal protection of the law as guaranteed by the Fourteenth Amendment of the United States Consitution and by Article 1, §23 of the Indiana Constitution. They claim further that such failure denies the parent plaintiffs their right under the Fourteenth Amendment to send their children to the school of their choice, and impermissibly burdens the free exercise of their religion guaranteed by the First Amendment of the United States Constitution and Article 1, §2

of the Indiana Constitution.[6]

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6 Specifically, the plaintiffs claim that the statutory classification based on attendance at Catholic parochial schools is 'suspect.' The plaintiffs argue that attendance at such schools is a recognized practice of the Catholic faith and that the free exercise of religion is a fundamental right, therefore the state must show a compelling interest in order for the classification to stand, under the equal protection clause of Fourteenth Amendment of the United States Constitution. The plaintiffs claim further that the statute, as read by this Court, would violate the due process clause of the Federal Constitution, Fourteenth Amendment, on the grounds that substantive due process forbids the denial of general welfare benefits on the basis of the plaintiffs' exercise of constitutionally protected rights. These rights are specified as the right of parents to send their children to the schools of their choice, and the right to free exercise of religion. The plaintiffs claim that the statute forces an election between eligibility for general welfare benefits and the exercise of these rights, thereby placing an impermissible burden on the exercise of constitutionally protected rights. Again, the plaintiffs argue that no compelling state interest supports the statutory scheme.

Identical issues were raised under the equal protection and due process clauses of the Fourteenth Amendment in Luetkemeyer v. Kaufmann, 364 F.Supp. 376 (W.D. Mo. 1973), affirmed 419 U.S. 888, 95 S.Ct. 167, 42 L.Ed.2d 134 (1974). In that case, the court found that the maintenance of separation of church and state was a legitimate and constitutional state interest which supported a statutory scheme in which only public school children were provided transportation to and from school. The court concluded that nothing in the Federal Constitution required the State of Missouri to provide equal transportation services to parochial schools. 364 F.Supp. at 387.

The propriety of this conclusion is strongly supported by the view expressed in Norwood v. Harrison, 413 U.S. 455, 93

S.Ct. 2804, 37 L.Ed.2d 723 (1973):

> The appellees intimate that the State must provide assistance to private schools equivalent to that which it provides to public schools without regard to whether the private schools discriminate on racial grounds. Clearly, the State need not. Even as to church-sponsored schools, whose policies are nondiscriminatory, any absolute right to equal aid was negated, at least by implication in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). The Religion Clauses of the First Amendment strictly confine state

> aid to sectarian education. Even assuming, therefore, that the Equal Protection Clause might require state aid to be granted to private non-sectarian schools in some circumstances--health care or textbooks, for example--a State could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance. See San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).

413 U.S. at 462, 93 S.Ct. at 2809 (original

emphasis). It has been argued on the authority of Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1946), that provision of transportation for parochial school children is parcel of general welfare legislation rather than aid to sectarian education. See Luetkemeyer v. Kaufmann, 419 U.S. 888, 95 S.Ct. 167, 42 L.Ed2d 134 (1974) (White, j., dissenting). In Norwood v. Harrison, supra, the Court clarified the 'child benefit' theory of Everson by explaining that the establishment clause of the First Amendment allows leeway for indirect aid: 'Plainly, religion benefits indirectly from governmental aid to parents and children....' 413 U.S. at 464, n. 7, 93 S.Ct. at 2810, n. 7.

In Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971),

the Court, speaking of its decision in Everson, stated:

> There Mr. Justice Black, writing for the majority, suggested that the decision carried to 'the verge' of forbidden territory under the Religion Clauses. [330 U.S., at 16, 67 S.Ct., at 511] Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation in this extraordinary sensitive area of constitutional law.

403 U.S. at 611-12, 91 S.Ct., at 2110.[7]

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7 While the Everson decision has continued to be cited with approval,

The plaintiffs herein argue essentially that a state cannot constitutionally withdraw from the 'verge' of which Justice Black spoke. Since Everson itself,[8] Supreme Court decisions have indicated otherwise. Norwood v. Harrison, supra, plainly indicates that the First Amendment Religion Clauses' allowance of leeway for indirect aid to religion includes scope for a legis-

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it is noteworthy that one of the five Justices who joined in the majority has since expressed 'grave doubts' as to its correctness. Walz v. Tax Commission of City of New York, 397 U.S. 664, 703, 90 S.Ct. 1409, 1429, 25 L.Ed.2d 697 (1970)(Douglas, j., dissenting).

8 '[W]e do not mean to intimate that a state could not provide transportation only to children attending public schools....' Everson v. Board of Education, 330 U.S. 1, 17, 67 S.Ct. 504, 512, 91 L.Ed. 711 (1946).

lature to decide that separation of church and state would best be served by denial of such indirect aid.

The Indiana provision limiting transportation of parochial school children seems tailored to accommodate the strictures of the Indiana Constitution, Article 1, §6, that no money be drawn from the treasury for the benefit of any religious or theological institution. According to Norwood v. Harrison, supra, this state interest is sufficiently substantial to support the statutory scheme in the face of Fourteenth Amendment challenges. 413 U.S., at 462, 93 S.Ct., at 2809.

In view of the above, this court agrees with the court in Luetkemeyer v. Kaufmann, supra, 364 F.Supp., at

387, that the United States Constitution does not require states to provide parochial school children with transportation to and from school on the same terms as public school children. Indeed, this court may not be at liberty to disagree. Mandel v. Bradley, 432 U.S. 173, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977); Hicks v. Miranda, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975) (a summary affirmance by the United States Supreme Court is binding precedent as to the precise questions presented and necessarily decided).

The same result obtains under the Indiana Constitution. Because Article 1, §23 of the Indiana Constitution protects the same rights as the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution, Reilly

v. Robertson, 266 Ind. 29, 369 N.E.2d 171, 175, cert. denied 434 U.S. 825, 98 S.Ct. 73, 54 L.Ed.2d 83 (1977), the validity of a statute under the Fourteenth Amendment is strongly persuasive of its validity under the corresponding Indiana constitutional provision. Midwestern Petroleum Corp. v. State Board of Tax Commissioners, 206 Ind. 688, 187 N.E. 882, 191 N.E. 153 (1933); Sperry & Hutchinson Co. v. State, 188 Ind. 173, 122 N.E. 584 (1919). Neither does it appear that Article 1, §2, of the Indiana Constitution offers greater protection than the First Amendment to the United States Constitution. Cf. Lynch v. Indiana State University Board of Trustees, Ind.App., 378 N.E.2d 900, 903-08, cert. denied 441 U.S. 946, 99 S.Ct. 2166, 60 L.Ed.2d 1048 (1978)

(same discussion sufficing for issues raised under both First Amendment and Article 1, §2, of Indiana Constitution).

It therefore appears that the defendants are under no duty, statutory or constitutional, to provide transportation for parochial school children beyond accommodation in established public school buses of those parochial school children who reside along those routes, should seats be available. The plaintiffs make no allegation that the defendants have failed to do this much, and the defendants have repeatedly averred their intent to continue to provide such transportation. Accordingly, the plaintiffs have no ground for complaint and the defendants' Motion to Dismiss should be granted.

O R D E R

In accordance with the foregoing, it is ordered that the defendants' motion to dismiss be granted, and that the claims filed on behalf of the named plaintiffs and all parents whose children now or in the future attend a Catholic parochial school located within the jurisdiction of the South Bend Community School Corporation and all school children who now attend or who in future attend Catholic parochial schools within the jurisdiction of the South Bend Community School Corporation, be dismissed for failure to state a claim upon which relief may be granted.

Dated this 18th day of January, 1982.

/s/ Gene B. Lee
Gene B. Lee,
United States Magistrate

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Attention: Mr. Franklin A Morse, II
Mr. Patrick J. O'Neil
Mr. Gregory L. Kelly

APPENDIX B2

DISTRICT COURT'S ORDER

OF FEBRUARY 26, 1982

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

ELIZABETH A. FRAME, et al.,

Plaintiffs,

vs. CIVIL NO. S81-0344

SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al.,

Defendants.

MEMORANDUM AND ORDER

This cause is now before the Court on the plaintiffs' Motion for New Trial, to make Findings of Fact, to Amend Judgment and for Attorney's Fees. The issues raised therein have been thoroughly briefed by both the plaintiffs and defendants, therefore the Court will rule without hearing argument.

The plaintiffs' motion will be deemed a motion for amendment of the

judgment of dismissal under Rule 59(e) of the Federal Rules of Civil Procedure. Because there has been no trial on the merits in this case, a motion for new trial under Rule 59(a) is inappropriate. By their motion, the plaintiffs raise new arguments in support of their claim that Indiana law requires transportation of parochial school children on equal terms with public school children, and the plaintiffs request that this Court reconsider its order of January 18, 1982. The plaintiffs argue that the Indiana Legislature evidenced an intent to alter prior law by including a definition of school children, encompassing both public and parochial school children, in the 1973 codification of the Pupil Transportation law. A comparison of that definition, found in I.C. 1971,

20-9.1-1-4, with Burns Ann. Stat. 28-5102(a) of the former School Transportation Code discloses that the language in question is not a 'critical amendment' but merely a recodification of prior law. Upon careful examination of the plaintiffs' arguments, the Court remains persuaded of the correctness of its order of January 18, 1982.

The plaintiffs also seek an amendment of the order to include a mandatory injunction requiring the defendants to provide transportation to the extent the Indiana law is therein construed to require. They rely on Rule 54(c) of the Federal Rules of Civil Procedure, which provides that a prevailing party shall be allowed all the relief to which he is entitled regardless of whether such relief was sought in the pleadings.

Where a motion to dismiss is at issue, Rule 54(c) must be considered in conjunction with Rules 8, 12 and 15: 'its clear and long-accepted meaning is that a complaint should not be dismissed for legal insufficiency except where there is a failure to state a claim on which some relief, not limited by the request in the complaint, can be granted.' (Original emphasis). Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 925 (2d Cir. 1968). In essence, the plaintiffs seek re-consideration of the dismissal on the grounds that the pleadings, motions and other materials in the record of this cause indicate a claim based on violation of a State-created right might be maintained for injunctive relief.

The present posture of this action does not permit the issuance of an injunction as requested by the plaintiffs. Cf. United States v. 47 Bottles, More or Less, Jenasol RJ Formula "60", 320 F.2d 564, 573-74 (3rd Cir.), cert. denied sub nom. Schere v. United States, 375 U.S. 953, 84 S.Ct. 444, 11 L.Ed.2d 313 (1963) (reversing amendment of pleadings at end of trial to seek injunctive relief). Relief cannot be granted without a basis in facts pleaded and established at trial or as a matter of law. See 6 MOORE'S FEDERAL PRACTICE ¶54.62, at 1265 (2n ed. 1981). The appropriate response to the plaintiffs' motion would be to amend the order of dismissal to permit the plaintiffs to presecute (sic) the claim, rather than summarily granting relief.

The plaintiffs' motion will nevertheless be denied: 'if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.' United Mine Worker v. Gibbs, 383 U.S. 715, 726 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966). The plaintiffs' asserted state claim is essentially at the pleading stage only. The considerations set out in United Mine Worker v. Gibbs, supra, outweigh the inconvenience incidental to requiring the plaintiffs to prosecute their state claim in state court. The plaintiffs' request for findings of fact and attorney's fees as well as the motion to permit submission of reply affidavits and to strike are moot.

The defendants herein have moved

for an award of attorney's fees and costs, under 42 U.S.C. §1988. It is established that a court may award attorney's fees to a prevailing defendant only 'upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.' Reichenberger v. Pritchard, 660 F.2d 280, 288 (7th Cir. 1981), quoting Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412, 421, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978). Upon review of the considerations set out in Reichenberger, the Court concludes that such a finding is not appropriate in the present case. The defendants' motion will be denied.

O R D E R

Accordingly, it is ordered that the

Motion for New Trial, to Make Findings of Fact, to Amend Judgment and for Attorney's Fees, the Motion for Oral Argument, and the Motion to Submit Reply Affidavits and to Strike, filed in this cause by the plaintiffs, be denied.

It is ordered further that the defendants' Motion for Costs and Attorney's Fees be denied. Each party will bear his own costs.

Dated this 26th day February, 1982.

/s/ Gene B. Lee
Gene B. Lee
United States Magistrate

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Mr. Patrick J. O'Neil
Mr. Gregory L. Kelly

APPENDIX C

COURT OF APPEALS' ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

January 27, 1983

Before

HON. WILLIAM J. BAUER, Circuit Judge

HON. RICHARD D. CUDAHY, Circuit Judge

HON. PAUL C. WEICK, Senior Circuit Judge*

ELIZABETH A. FRAME, et al., Plaintiffs-Appellants,	)	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 82-1383 vs.	)	
SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al., Defendants-Appellees.	)	Civil No. 5(sic)81-0344 Gene B. Lee, Magistrate.

O R D E R

On consideration of the petition for

---

* The Honorable Paul C. Weick, Senior Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.

rehearing and suggestion for rehearing en banc filed in the above-entitled cause by plaintiffs-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULE

United States Constitution:

Amend. 1

Religious and political freedom.-- Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

. . . .

Amend. 14

§1. Citizenship--Due process of law--Equal protection.-- . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

. . . .

Indiana Constitution:

Art. 1

§2. Right to worship.--All men shall be secured in their natural right to worship Almighty God, according to the dictates of their own consciences.

. . . .

§23. Privileges equal.--The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

Indiana Code:

20-8.1-2-1 [28-5304]. Policy.--It is the public policy of the state of Indiana:

(a) To provide, furnish and make available equal, nonsegregated, non-discriminatory educational opportunities and facilities for all regardless of race, creed, national origin, color or sex;

. . . .

20-1.9-1-3 [28-5101b]. 'Private school' defined.--As used in this article [20-9.1-1-1--20-9.1-7-4], the term 'private school' means any school which is not supported and maintained by funds realized from the imposition of a tax on property, income or sales. [IC 1971, 20-9.1-1-3, as added by Acts 1973, P.L. 218, §2, p. 1097.]

20-9.1-1-4 [28-5101c]. 'School children' defined.--As used in this

article [20-9.1-1-1--20-9.1-7-4], the term 'school children' means any children enrolled in public or private schools at any level between kindergarten and grade twelve [12]. [IC 1971, 20-9.1-1-4, as added by Acts 1973, P.L. 218, §2, p. 1097.]

. . . .

20-9.1-2-1 [28-5102]. Power to provide transportation.--The governing body of each and every school corporation may provide transportation for school children to and from school.

. . . .

20-9.1-2-29 [28-5130]. Private schools exempt.--This chapter [20-9.1-2-1--20-9.1-2-29] does not apply to any private school or to any school bus driver contract executed for a private school. [IC 1971, 20-9.1-2-29, as added by Acts 1973, P.L. 218, §2, p. 1097.]

. . . .

20-9.1-7-1 [28-5191]. Parochial school students--No charge.--When school children who are attending a parochial school in any school corporation reside on or along the highway constituting the regular route of a public school bus, the governing body of the school corporation shall provide transportation for them on the school bus. This transportation shall be from their homes, or from some point on the regular route nearest or most easily accessible to their homes, to and from the parochial school or to and from the point on the regular route which is nearest or most easily accessible to the parochial school. [IC 1971, 20-9.1-7-1, as added by Acts 1973, P.L. 218, §2, p. 1097.]

. . . .

22-9-1-2 [40-2308]. Purpose--Public policy of state.--(a) It is the

public policy of the state of Indiana to provide all of its citizens equal opportunity for education, employment, access to public conveniences and accommodations and acquisition through purchase or rental of real property including but not limited to housing, and to eliminate segregation or separation based solely on race, religion, color, sex, national origin or ancestry, since such segregation is an impediment to equal opportunity. Equal education and employment opportunities and equal access to and use of public accommodations and equal opportunity for acquisition of real property are hereby declared to be civil rights.

(b) The practice of denying these rights to properly qualified persons by reason of the race, religion, color, sex, national origin or ancestry of such person is contrary to the principles of freedom

and equality of opportunity and is a burden to the objectives of the public policy of this state and shall be considered as discriminatory practices. The promotion of equal opportunity without regard to race, religion, color, sex, national origin or ancestry through reasonable methods is the purpose of IC 1971, 22-9-1 [22-9-1-1--22-9-1-12].

. . . .

(e) IC 1971, 22-9-1 [22-9-1-1--22-9-1-12] shall be construed broadly to effectuate its purpose. [Acts 1961, ch. 208, §2, p. 500; 1963, ch. 173, §2, p. 216; 1965, ch. 214, §1, p. 484; 1967, ch. 276, §1, p. 876; 1969, ch. 298, §1, p. 1242; 1971, P.L. 357, §2, p. 1444.]

. . . .

Ind.R.App.P.

Rule 15(O). Certification of Questions of State Law from Federal Courts.

When it shall appear to the Supreme Court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the Supreme Court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the Supreme Court of this state for instructions concerning such questions or propositions of state law which certificate the Supreme Court of this state, by written opinion, may answer.

APPENDIX E

MINUTES OF SCHOOL BOARD MEETINGS

(Plaintiffs' Exhibits 2, 4 and 5)

MINUTES OF SCHOOL BOARD MEETINGS

(Plaintiffs' Ex. 2)

Board of School Trustees
August 3, 1981

Dr. Scamman said there are three approaches the Board could take. The first is a seats available interpretation. He said we do not believe we could show what an empty seat availability would be until August 20 and it is our intent to minimize those seats for economic reasons. The second approach is picking up all students who come to an existing public school route, which could mean adding more buses. He said there is no way to estimate the numbers of students interested and it is a Transpo type of service and would take some experience and practice. The third approach is providing the same level to the pa-

rochial students as provided to the public school students and living under the same policies.

. . . .

Dr. Scamman said . . . the grand total is 4,375. Some of the parents indicated some of the numbers are overstated by some amount, so the figures are only ballpark. He said we can probably work with the basic issue based on these estimates.

Dr. Scamman said it is not our intention to make a recommendation regarding this issue. He said this is a public community decision and involves local money in an unfrozen fund. Dr. Scamman said one point of view, is providing a parity service would make parochial attendance more attractive, but some schools are at capacity now. He

said we would like some direction on how the Board wishes to deal with the issue.

. . . .

Mr. Hughes said one of his major concerns is that as we started desegregating the corporation last year, we anticipated we would lose some of our student population. He said it does not please him to think we will be providing transportation to people who are fearful of yellow buses. . . . He said he would have no problem this year in dealing with a parity level system strictly as a matter of expediency and because the funds are available to us to work with.

. . . .

Mrs. Jacobson said she would agree since we decided to bus students and

have 50 new buses that we should provide transportation for all school children.

. . . .

Mr. Wilson said the problem of helping the private system survive does not bother him and he views it as a challenge.

. . . .

(Plaintiffs' Ex. 4)

Board of School Trustees
August 20, 1981

Mrs. Nancy Love asked how much was budgeted for busing of private and parochial students and Mr. Reidy said we estimate $790,000. . . .

. . . .

Mrs. Love asked how many were transported and Mr. Yates said we

bused about 500 last year. . . .

. . . .

(Plaintiffs' Ex. 5)

Board of School Trustees Meeting
September 8, 1981

Mr. Hughes said . . . we are dealing with the whole issue of coming up with a system that comes with the same problems for parochial students that we have for the corporation. Mr. Hughes said we have no intention of approving a system that will be a better deal for parochial students than for patrons of the public school system.

. . . .

Mr. Yates said . . . We want to do something more and he is convinced what we are doing today is wrong because we are providing nothing. He said he is

sensitive to the people who have not seen the people who have been working on this plan day and night. It has been our top priority and whatever we do, we must be concerned about our own competition.

. . . .

Dr. Brookins moved the Board instruct the administration to develop a transportation plan in the interim to provide for transportation of parochial students on a space available and existing school routes basis, and Mr. Yates seconded the motion.

. . . .

Upon vote on the original motion, it carried by a majority vote in the following manner: Ayes Dr. Bender, Dr. Brookins, Mr. Hughes, Mrs. Jacobson, Mr. Luber, Mr. Yates; Nays Mr. Wilson.

APPENDIX F

PLAINTIFFS' COMPLAINT

(Plaintiffs' Ex. 1)

(Plaintiffs' Ex. 1)

STATE OF INDIANA)
) SS:
ST. JOSEPH COUNTY)

IN THE ST. JOSEPH SUPERIOR COURT
MISHAWAKA DIVISION

CAUSE NO. M-81-CV-331

ELIZABETH A. FRAME;
TONI M. POTAPOW;
MARY ANN MacCARTHY;
BARBARA HARTZKE;
JOSEPH B. SCHOPMEYER;
JOHN M. WILLIAMS;
ROSEMARIE GREEN,
parent plaintiffs, individually and on behalf of all others similarly situated;
JEFFREY A. FRAME;
MICHAEL G. POTAPOW;
MICHAEL P. MacCARTHY;
JENNIFER HARTZKE;
JENNIFER A. SCHOPMEYER;
SHEILA A. WILLIAMS;
ERIN MARIE GREEN, minor plaintiffs, individually and on behalf of all others similarly situated,

vs.

SOUTH BEND COMMUNITY SCHOOL CORPORATION;
JAMES P. SCAMMAN, Superintendent of the South Bend Community School Corporation;
HOLLIS E. HUGHES, JR.;
DONALD W. YATES;
EILEEN T. BENDER;

VERIFIED COMPLAINT FOR INJUNCTIVE, DECLARATORY AND MONETARY RELIEF

OSCAR T. BROOKINS;)
ANTHONY V. LUBER;)
WILLIAM L. WILSON;)
LORETTA JACOBSEN,)
Members, Board of)
School Trustees of)
the South Bend)
Community School)
Corporation,)
)
Defendants.)

For cause of action against the defendants, the plaintiffs state that:

1. They are residents of St. Joseph County, Indiana. The parent plaintiffs are the owners of real estate located within St. Joseph County on which they pay taxes.

2. The parent plaintiffs are the parents of children who attend private Catholic parochial elementary and high schools which meet all of the requirements of State law. The minor plaintiffs attend private Catholic parochial elementary and high schools which meet

all the requirements of State Law. The schools which the minor plaintiffs attend are located within the geographical jurisdiction of the South Bend Community School Corporation (hereinafter School Corporation).

3. The parent plaintiffs sue on their own behalf and, pursuant to Trial Rule 23(B)(2) and (3), on behalf of all other taxpaying parents who have chosen to send their children to private Catholic parochial schools located within the geographical jurisdiction of the School Corporation. The minor plaintiffs sue on their own behalf and, pursuant to Trial Rule 23(B)(2) and (3), on behalf of all other children who attend private Catholic parochial schools within the geographical jurisdiction of the School Corporation.

The class is so numerous that joinder of all members is impracticable. There are questions of law or fact common to the class, and the claims of the representative parties are typical of the claims of the class. The plaintiffs will fairly and adequately protect the interests of the class. The defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive, declaratory and other relief with respect to the class as a whole.

4. The defendant James P. Scamman is the Superintendent of the School Corporation.

5. The defendants Hughes, Yates, Bender, Brookins, Luber, Wilson and Jacobsen are members of the Board of School Trustees of the School Corpo-

ration (hereinafter the School Board).

6. For several years the School Corporation, acting through the defendant Scamman and by direction of the School Board, has provided transportation for school children to and from school, including transportation for some children attending Catholic parochial schools.

7. Pursuant to I.C. 20-9.1-1-1, et seq., the School Corporation is now providing bus transportation to public school children. Even though they have been requested to do so, the School Board, School Corporation and defendant Scamman, by official policy and/or custom, have refused and are now refusing to provide the same safe transportation for the minor plaintiffs and the class they represent.

8. The actions of the School Corporation, School Board and the defendant Scamman in denying safe school transportation to the minor plaintiffs and the class they represent:

A. Is arbitrary, capricious and contrary to the laws of the State of Indiana providing for the safe transportation of school children and for equal civil rights to all citizens;

B. Denies them their rights to equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America and by Article 1, §23, of the Constitution of the State of Indiana;

C. Denies the parent plaintiffs their right to send their children to private schools of their choice as guaranteed by the Fourteenth

Amendment to the Constitution of the United States of America and compulsory school attendance laws of the State of Indiana;

D. Impermissibly burdens the rights of the parent plaintiffs and minor plaintiffs to freely exercise the religion of their choice as guaranteed by the First Amendment to the Constitution of the United States of America and Article 1,§2, of the Constitution of the State of Indiana.

9. There is an actual controversy between the parties. The plaintiffs and the class they represent have suffered and will continue to suffer irreparable injury by virtue of the acts and practices of the defendants as alleged in paragraphs 7 and 8. As a result of the acts and practices of the

defendants, the minor plaintiffs and the class they represent have been denied and are being denied safe transportation to schools of their choice; the parent plaintiffs have incurred and will incur expenses to provide transportation for their children to school. Unless they are enjoined, the defendants will continue to deprive the plaintiffs of their rights and privileges as guaranteed by the Constitutions and laws of the United States and the State of Indiana.

WHEREFORE, plaintiffs pray as follows:

1. For an order pursuant to Trial Rule 23(C)(1) that this suit be maintained as a class action;

2. For a declaratory judgment that the acts and practices of the defendants

arbitrarily discriminate against the parents of Catholic parochial school children, and the children themselves, are contrary to the compulsory school attendance laws, pupil transportation and civil rights laws of the State of Indiana, the Federal Civil Rights Act of 1871 (42 U.S.C. §1983), the First and Fourteenth Amendments to the United States Constitution and Article 1, §§2 and 23, of the Indiana Constitution;

3. For an order mandating that the defendants provide the parochial Catholic school children with school bus transportation to their chosen schools, using the same guides and eligibility requirements encompassed within the plan developed to transport children who attend public schools;

4. For an order awarding the

plaintiffs and the class members the damages they have sustained and will sustain on account of the illegal, unconstitutional acts of the defendants;

5. For an order awarding plaintiffs reasonable attorney's fees and costs;

6. For such other and further relief as the interests of justice may require.

We affirm under the penalties for perjury that the foregoing representations are true.

/s/ Elizabeth A. Frame
Elizabeth A. Frame

/s/ Toni M. Potapow
Toni M. Potapow

/s/ Mary Ann MacCarthy
Mary Ann MacCarthy

/s/ Barbara Hartzke
Barbara Hartzke

/s/ Joseph B. Schopmeyer
Joseph B. Schopmeyer

/s/ John M. Williams
John M. Williams

/s/ Rosemarie Green
Rosemarie Green

/s/ Jeffrey A. Frame
Jeffrey A. Frame

/s/ Michael G. Potapow
Michael G. Potapow

/s/ Michael P. MacCarthy
Michael P. MacCarthy

/s/ Jennifer Hartzke
Jennifer Hartzke

/s/ Jennifer A. Schopmeyer
Jennifer A. Schopmeyer

/s/ Sheila Williams
Sheila A. Williams

/s/ Erin Marie Green
Erin Marie Green

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APPENDIX G

DEFENDANTS' MOTION TO DISMISS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

ELIZABETH A. FRAME; et al,	)	
Plaintiffs, individually and on behalf of all others similarly situated,	)	CIVIL NO. 581-0344
v.	)	
SOUTH BEND COMMUNITY SCHOOL CORPORATION; et al,	)	
Defendants.	)	

MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM

The defendants, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, respectfully move that the complaint be dismissed for failure to state a claim upon which relief can be granted.

In support of the motion to dismiss, the defendants state:

1. The plaintiffs allege that the defendants' failure to provide bussing to the private Catholic school students within its jurisdiction violates the statutes and Constitution of the State of Indiana and the Constitution of the United States.

2. The defendants are willing to provide transportation to that number of non-public school students who can be accomodated in school busses already in operation over regularly established routes for the reason that the laws and Constitution of the State of Indiana and the Constitution of the United States require them to do no more.

3. Thus, plaintiffs' complaint should be dismissed for failure to state a claim upon which relief can be

granted.

4. A memorandum in support of the motion to dismiss is filed contemporaneously herewith.

Dated this 14 day of October, 1981.

THORNBURG, McGILL, DEAHL, HARMAN, CAREY & MURRAY

/s/ Franklin A. Morse, II
Franklin A. Morse, II
Sixth Floor, First Bank Building
South Bend, Indiana 46601
Telephone: (219) 233-1171

Attorney for the defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been delivered to Timothy W. Woods, 1800 American National Bank Building, South Bend, Indiana 46601, attorney for the plaintiffs, by placing the same in the United States mail, postage prepaid.

/s/ Franklin A. Morse, II

No. 82-1713

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ELIZABETH A. FRAME, et al.,

Petitioners,

v.

SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Counsel of Record for Respondents
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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly affirmed the District Court's determination of a question of state law when:

(a) the state statute is not fairly susceptible of an interpretation that would avoid or modify the federal constitutional issues;

(b) petitioners first suggested abstention and certification of the state law question in their petition for rehearing before the Court of Appeals; and

(c) the respondent state parties invoked the jurisdiction of the District Court and oppose abstention or certification.

2. Whether the Free Exercise Clause of the first amendment or the Equal Protection Clause of the fourteenth amendment require a public school corporation to provide the same transportation services for students attending private sectarian schools that it provides for students attending its public schools.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ELIZABETH A. FRAME, et al.,

Petitioners,

v.

SOUTH BEND COMMUNITY SCHOOL CORPORATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following constitutional provisions and statutes:

1. U.S. Const., amend. I, and amend. 14, § 1;
2. IND. Const. art. I, §§ 2, 6, 23;
3. 42 U.S.C. § 1983 (Supp. IV 1980); and
4. IND. CODE §§ 20-9.1-2-1, 20-9.1-2-29, and 20-9.1-7-1 (1982).

The texts of the foregoing are set forth in the petitioners' Appendix ("Pet. App.") at 77a-79a, 81a-82a, except for IND. Const. art I, § 6, which provides: "No money shall be drawn from the treasury, for the benefit of any religious or theological institution."

STATEMENT OF THE CASE

To promote racial desegregation within its school system, respondent South Bend Community School Corporation instituted programs during the 1980-81 school year which included increased bus transportation of students attending its public schools. (*See* Pet. App. at 89a). On September 8, 1981, respondent members of the Board of School Trustees of the South Bend Community School Corporation voted to provide bus transportation along existing school bus routes, and on a space available basis, for students attending private parochial schools within the School Corporation's boundaries. (Pet. App. at 92a).

On September 22, 1981, petitioners, children attending private Catholic parochial elementary and high schools and their parents, commenced this action in the Superior Court for St. Joseph County, Indiana. (Pet. App. at 94a). Petitioners' complaint alleged that respondents were "providing bus transportation to public school children" and were "refusing to provide the same safe transportation" for the plaintiff children attending private parochial schools. (Pet. App. at 98a). Petitioners alleged that this failure to provide the same transportation violated their rights under state statute, the Free Exercise Clause of the first amendment and the Equal Protection Clause of the fourteenth amendment of the United States Constitution, and counterpart provisions of the Indiana Constitution. (Pet. App. at 99a-100a).

Petitioners brought their action as a class action on behalf of themselves and "all other taxpaying parents who have

chosen to send their children to private Catholic parochial schools within the geographical jurisdiction of the School Corporation." (Pet. App. at 96a). Pursuant to 42 U.S.C. § 1983, petitioners sought damages on behalf of themselves and the class, attorney's fees, and declaratory and injunctive relief ordering respondents to "provide . . . parochial Catholic school children with school bus transportation to their chosen schools, using the same guides and eligibility requirements encompassed within the plan developed to transport children who attend public schools." (Pet. App. at 101a-103a).

Respondents removed this action pursuant to 28 U.S.C. § 1441 to the United States District Court for the Northern District of Indiana. Following a hearing on petitioners' motions for a preliminary injunction and class certification and respondents' motion to dismiss the complaint for failure to state a claim, the District Court certified petitioners' claims for damages as a class action pursuant to Fed. R. Civ. P. 23(b)(3), and their claims for injunctive relief as a class action pursuant to 23(b)(2). District Judge Sharp thereafter recused himself from the case, and the parties consented to the referral of the case to the United States Magistrate pursuant to 28 U.S.C. § 636.

By an unreported memorandum opinion and order entered January 18, 1982, the District Court granted respondents' motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6). (Pet. App. at 15a-62a). The Court determined that the applicable Indiana statute did not require respondents to provide school transportation for parochial school children on equal terms with public school children (Pet. App. at 25a-49a), but only that they "supply transportation when eligible parochial school children can be accommodated on public school buses already in operation for the benefit of public school children." (Pet. App. at 48a-49a). The District Court further held that the failure to provide transportation for parochial school students on equal terms with public school students did

not violate petitioners' rights freely to exercise their religion and to equal protection of the laws under the first and fourteenth amendments of the United states Constitution and the counterpart provisions of the Indiana Constitution. (Pet. App. at 49a-60a).

Following entry of the District Court's memorandum opinion and order dismissing the complaint, petitioners moved for a new trial and to amend the judgment, which the Court treated as a motion to amend the judgment of dismissal pursuant to Fed. R. Civ. P. 59(e). (Pet. App. at 64a-65a). Insofar as petitioners' motion sought to assert new claims alleging that respondents were failing to provide transportation to the limited extent required by state statute, the District Court declined to assert pendent jurisdiction over those state law claims (Pet. App. at 66a-69a), and reaffirmed its dismissal of the action. (Pet. App. at 70a-71a).

On petitioners' appeal of the dismissal of their action, the Court of Appeals for the Seventh Circuit affirmed in part and reversed in part. In an unpublished order dated November 30, 1982 (Pet. App. at 2a), the Court of Appeals affirmed the District Court's determinations that state law provides for only limited transportation of parochial school students, and that the failure to provide the same transportation for parochial school students as is provided for public school students does not violate petitioners' rights under the state and federal constitutions. (Pet. App. at 5a-8a). The Court of Appeals also held that the District Court did not abuse its discretion in declining to exercise pendent jurisdiction over petitioners' new claims that respondents were not providing the limited transportation required by state law. (Pet. App. at 8a-9a). However, the Court of Appeals reversed the District Court's dismissal of those claims, holding that since the case had been removed to federal court, those state law claims should have been remanded rather than dismissed. (Pet. App. at 9a-12a).

Petitioners thereafter petitioned the Court of Appeals for rehearing, and suggested for the first time that the Court of Appeals certify all state law questions to the Indiana Supreme Court. By order dated January 27, 1983, the Court of Appeals denied the rehearing petition. (Pet. App. at 74a-75a).

SUMMARY OF ARGUMENT

The Court of Appeals correctly affirmed the District Court's decision rejecting petitioners' state law claims to equal transportation services, and acted properly and within its discretion in denying petitioners' suggestion on petition for rehearing that the state law claims be certified to the Indiana Supreme Court. The decision of the Court of Appeals on petitioners' federal claims is correct, is in accordance with this Court's decisions, does not conflict with the decisions of any other federal court, and does not warrant further review.

ARGUMENT

I. The Court of Appeals Properly Affirmed The District Court's Determination That Petitioners Have No State Law Right To The Same Transportation As Is Provided To Students Attending Public Schools.

Petitioners urge that the Court of Appeals' affirmance of the dismissal of their state law claims to equal transportation services "call[s] for an exercise of this Court's power of supervision." (Pet. at 22). However, it is petitioners' argument that this Court should certify those state law questions to the Indiana Supreme Court, or order on its own motion that the District Court abstain under *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) (Pet. at 25-26 & n. 14), that calls for a "depart[ure] from the accepted and usual course of judicial proceedings." (Pet. at 22). The Court of Appeals' affirmance of the dismissal of petitioners' state law claims to equal services is not even arguably erroneous, let alone so demonstrably outrageous as to warrant exercise of this Court's supervisory power.

Petitioners did not move for *Pullman* abstention in the District Court. Furthermore, petitioners did not argue *Pullman* abstention in the Court of Appeals or move for certification of the state law issues before that Court's decision. Only after losing their appeal on the merits did petitioners first suggest — in their petition for rehearing — certification to the Indiana Supreme Court.

Petitioners' abstention-*cum*-certification argument to this Court thus presents a classic instance of the defeated litigants' attempt at a second bite at the apple. Having thoroughly briefed the state law issues to the Court of Appeals and having urged that Court to hold in their favor, petitioners upon losing now urge that another court should have decided those issues. This Court has repeatedly noted that the abstention doctrine is

equitable in origin and that a party's failure to suggest it at the early stages of the litigation properly influences any later decision whether it should be ordered. *E.g., Bellotti v. Baird,* 428 U.S. 132, 143 n.10 (1976); *Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324, 328-29 (1964); *see also First Federal Sav. & Loan Ass'n v. Greenwald,* 591 F.2d 417, 424-25 (1st Cir. 1979). The Court of Appeals plainly did not abuse its discretion in denying petitioners' belated suggestion for certification in their petition for rehearing.[1]

Furthermore, *Pullman* abstention would have been improper even had it been suggested to the District Court or the Court of Appeals in a timely manner because neither of the policies informing that doctrine are present in this case. Where, as here, the state agency and officials themselves invoked federal jurisdiction and oppose abstention, the policy of avoiding "needless friction" with state policies and administration, *Railroad Comm'n v. Pullman Co.,* 312 U.S. at 500-01, carries little if any weight. *Cf. Southwest Airlines Co. v. Texas International Airlines, Inc.,* 546 F.2d 84, 93 (5th Cir.), *cert. denied,* 434 U.S. 832 (1977).

As importantly, *Pullman* abstention is improper unless the state statute involved is "fairly susceptible" of an interpretation

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[1] This Court has said resort to the certification technique in particular "rests in the sound discretion of the federal court." *Lehman Bros. v. Schein,* 416 U.S. 386, 391 (1974). *See also id.* at 395 (Rehnquist, J., concurring):

> If a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used. The question of whether certification on the facts of this case, particularly in view of the lateness of its suggestion by petitioners, would have advanced the goal of correctly disposing of this litigation on the state law issue is one which I would leave, and I understand that the Court would leave, to the sound judgment of the court making the initial choice.

"that would avoid the necessity of constitutional adjudication." *Kusper v. Pontikes*, 414 U.S. 51, 55 (1973). *Accord New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 100 n.3 (1978); *Zablocki v. Redhail*, 434 U.S. 374, 379-80 n.5 (1978); *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 597-98 & n.29 (1976); *Procunier v. Martinez*, 416 U.S. 396, 402-404 (1974) (no "reasonable interpretation" of the state statute "would avoid or modify the federal constitutional question"). There is no such "fair" or "reasonable" interpretation available in this case that could avoid the federal constitutional issues.

IND. CODE § 20-9.1-7-1 (1982) provides:

> When school children who are attending a parochial school in any school corporation reside on or along the highway constituting the regular route of a public school bus, the governing body of the school corporation shall provide transportation for them on the school bus. This transportation shall be from their homes, or from some point on the regular route nearest or most easily accessible to their homes, to and from the parochial school or to and from the point on the regular route which is nearest or most easily accessible to the parochial school.

There is no "fair" or "reasonable" interpretation of that language that could confer upon petitioners a statutory right to the same transportation as is provided to students attending public schools.

As set forth in the District Court's opinion, 50 years of state interpretation and legislative action, as well as the express terms of IND. CODE § 20-9.1-7-1, repudiates petitioners' statutory claim. That Indiana statute was originally enacted in 1933 as an amendment to Burns' Ind. Stat. § 28-2805. (*See* Pet. App. at 32a-34a). In 1936, an official opinion of the Indiana Attorney General concluded the amendment "neither requires nor authorizes the school . . . trustees to place any additional bus on the route in order to accommodate parochial pupils otherwise eligible for transportation." 1936 Op. Ind. Att'y Gen. 415, 416.

Thus, "the privilege of free transportation to parochial pupils [extended only] where they could be accommodated in the bus or conveyance already in use on such regular route . . . ." *Id.*

In 1963, the Indiana legislature created a Commission to study and recommend to the legislature a codification of the State's school transportation laws. 1963 Ind. Acts, ch. 414. At the request of the chairman of the Commission, the Indiana Attorney General reaffirmed his 1936 opinion interpreting the statute. 1964 Op. Ind. Att'y Gen. 44, 46. The Commission then recommended enactment of a statutory provision nearly identical in language to the original statute, *Report of Commission To Recodify School Transportation Laws, reprinted in* Indiana Legislative Advisory Commission, *Report To The General Assembly of 1965* at 177, 193 (1965), and reported to the legislature that "[t]he situation *vis a vis* the availability of public school buses to parochial school students *will remain exactly the same* as it is under today's laws." *Id.* at 179 (emphasis added). Pursuant to the Commission's Report, the legislature enacted the Commission's recommendation verbatim as Burns' Ind. Stat. § 28-5002. *See* 1965 Ind. Acts, ch. 260, § 901.[2]

In 1973, the Indiana legislature again recodified the school transportation laws, and enacted the former statute as IND. CODE § 20-9.1-7-1, again in nearly identical language. The legislature also expressly provided that no substantive change was intended in statutes re-enacted in the 1973 recodification. 1973 Ind. Acts, P.L. 218, § 6(a) (reprinted in the Compiler's Notes to IND. CODE § 20-9.1-1-1 (1982)). More recently, another opinion of the Indiana Attorney General again confirmed his longstanding interpretation of the statute. 1980 Op. Ind. Att'y. Gen. 96, 97.

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[2] Given that legislative re-enactment, based on the Commission's Report and the Attorney General's construction of the original statute, petitioners' argument that no state court has construed the statute (Pet. at 11 n.6) is simply irrelevant.

Accordingly, there would be no basis whatever for ordering *Pullman* abstention on petitioners' state law claim to equal transportation services, even had petitioners suggested abstention in the courts below and even were it not the state parties who invoked federal jurisdiction and who oppose abstention. Given the statute's express terms and clear legislative history, no "fair" or "reasonable" interpretation is available that might avoid or modify adjudication of petitioners' federal constitutional claims. Rather, the state statute "on its face gives the [respondents] the power to do what [they] did." *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971).[3]

II. The Court of Appeals Decided The Federal Issues Correctly And In Accordance With This Court's Decisions.

Petitioners' federal constitutional claim is that a public school corporation's failure to provide students attending private sectarian schools with the same transportation services

[3] In the courts below, petitioners sought to manufacture a statutory right to equal transportation by referring to IND. CODE § 20-9.1-2-1 (1982), which provides that a school corporation "may provide transportation for school children" and then arguing that § 20-9.1-1-4 defines "school children" as including "children enrolled in . . . private schools . . . ." That argument first confronts the nearly insuperable difficulties that § 20-9.1-2-1 merely authorizes and does not require that transportation be provided, and that the chapter in which § 20-9.1-2-1's authorization of transportation appears is expressly made inapplicable to "any private school." IND. CODE § 20-9.1-2-29 (1982). And even if those hurdles could be overcome, there is, as the District Court held (Pet. App. at 27a), absolutely no warrant for any interpretation which would negate the express terms and plain history of § 20-9.1-7-1 relating to transportation of students attending parochial schools.

Although petitioners assert that this Court should certify or order abstention on all state law claims, the argument portion of their petition refers exclusively to their statutory claims to equal transportation services. (Pet. at 22-26). In any event, there is, as the District Court held, no basis whatever for inferring that their constitutional claims would or should be resolved differently under the Indiana Constitution. (Pet. App. at 58a-60a).

provided students attending the corporation's public schools violates the Free Exercise Clause of the first amendment or the Equal Protection Clause of the fourteenth amendment. Simply put, petitioners argue that public aid to private parochial schools that is not *prohibited* by the Establishment Clause is *required* by the Free Exercise and Equal Protection Clauses. This Court's decisions, sound constitutional policy and common sense all dictate that the Court of Appeal's rejection of this claim was correct and does not warrant further review.

In *Everson v. Board of Education*, 330 U.S. 1 (1947), this Court held that state reimbursement to parents for transportation expenses of children attending private, including sectarian, schools did not violate the Establishment Clause of the first amendment. In that decision, the Court unequivocally stated: "[*W*]*e do not mean to intimate that a state could not provide transportation only to children attending public schools* . . . ." *Id.* at 16 (emphasis added). In the years following *Everson*, that statement has been uniformly followed by all federal courts, including this one.

In *Brusca v. Missouri ex rel. State Board of Education*, 332 F. Supp. 275 (E.D. Mo. 1971), *aff'd*, 405 U.S. 1050 (1972), children attending private sectarian schools and their parents challenged as unconstitutional a section of the Missouri Constitution which provided:

> Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help support or sustain any private or public school . . . or other institution of learning controlled by any religious creed, church or sectarian denomination whatever.

Id. at 276. In that case, as in this one, "parent-plaintiffs claim[ed] to be entitled, as a matter of federal constitutional

right, to tax-raised funds for the purpose of affording a religious education to their children." *Id.* at 276-77.

With respect to the plaintiffs' Free Exercise claim, the district court held "that to the extent the Religion Clauses of the First Amendment do not prohibit such financial aid, they do not require that it be given by the State". *Id.* at 279.[4] With respect to the plaintiffs' Equal Protection claim, the court held that there is

> nothing arbitrary or unreasonable in the determination of the State to deny its funds to sectarian schools or for religious instruction. So long as no invidious discrimination exists, the courts may not interfere . . . . Here, there is no discrimination in the legal sense. All children of every or no religious denomination have the same right to attend free secular public schools maintained with tax funds. The fact that a child or his parent for him voluntarily chooses to forego the exercise of the right to educational benefits provided in the public school systems does not deprive him of anything by State action. Nor does a tax-paying parent who chooses to send his children to a religiously-oriented school have a constitutional right to any credit for his taxes which support the public schools simply because he will not or cannot make use of them. Other taxpayers—*e.g.*, bachelors, childless couples, corporations—pay taxes for the support of schools and receive no more benefit from such tax payments than do the parent-plaintiffs who forego sending their children to free public schools.

Id. (citation omitted).

On appeal to this Court, the plaintiffs in *Brusca* specifically raised both the Free Exercise Clause and Equal Protection Clause issues. Jurisdictional Statement, No. 71-940, at 2-3. This Court summarily affirmed the district court's judgment. 405 U.S. 1050 (1972).

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[4] The district court specifically mentioned school bus transportation as aid the State was not required to provide. *Id.* at 277 n.2.

Subsequently, in *Luetkemeyer v. Kaufman*, 364 F.Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974), children attending a parochial school and their parents challenged under the Free Exercise and Equal Protection Clauses the State's refusal to provide bus transportation. In that case, unlike this one, transportation was denied parochial school students even on existing buses and routes maintained by the public schools. *Id.* at 379.[5] The district court rejected both constitutional claims. *Id.* at 381-384. Plaintiffs expressly argued that because *Everson* held that public transportation for parochial school students did not violate the Establishment Clause, such transportation was required by the Free Exercise Clause. *Id.* at 381. The district court held, however, that "[p]rinciples which state what a State *may* do may not properly be read as a command to what a State *must* do." *Id.* (emphasis in original).

On appeal to this Court, the plaintiffs in *Luetkemeyer* raised both the Equal Protection and Free Exercise issues. Jurisdictional Statement, No. 73-1612, at 8-9. This Court summarily affirmed the district court's judgment. 419 U.S. 888 (1974).[6]

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[5] Justice White, joined by the Chief Justice, may have had that fact in mind in dissenting from the Court's affirmance—he "question[ed] whether *in some circumstances* a State may be constitutionally compelled to provide such transportation." 419 U.S. at 889 (White, J., dissenting) (emphasis added). *Cf. Widmar v. Vincent*, 454 U.S. 263, 288 (1981) (White, J., dissenting):

> There are a variety of state policies which incidentally benefit religion that this Court has upheld without implying that they were constitutionally required of the State. *See . . . Everson v. Board of Education*, 330 U.S. 1 (1947) (state provision of transportation to parochial school students).

[6] *See also DiCenso v. Robinson*, 316 F. Supp. 112, 123 (D.R.I. 1970), *aff'd sub nom. Lemon v. Kurtzman*, 403 U.S. 602 (1971) (rejecting intervenors' argument that the "Free Exercise Clause demands affirmative state action" for private sectarian schools); *Valencia v. Blue Hen Conference*, 476 F. Supp. 809, 823-24 (D. Del. 1979), *aff'd*, 615 F.2d 1355 (3d Cir. 1980); *Thomas v. Allegany*

Footnote continued on next page.

The issues presented in this case are controlled by those decisions. As in *Brusca*, 332 F.Supp. at 279, all children under respondents' jurisdiction have the right to attend the public schools, and the distinction drawn by respondents in terms of transportation services is between those who do and those who have chosen not to. This case does *not* involve any invidious discrimination based upon religious belief. *There is no allegation in the complaint that respondents are discriminating among particular sectarian schools, or between sectarian and other private schools.* There is no such allegation because petitioners know that they are being afforded the same limited transportation services that respondents make available to students attending all private schools within the School Corporation's boundaries.[7]

Even were the facts otherwise, this Court has recognized that a State has "leeway" in denying public support to private parochial schools in the interest of maintaining a higher wall between church and state than is compelled by the Establishment Clause of the first amendment. *Norwood v. Harrison*, 413 U.S. 455, 464 n.7 (1973). In *Norwood*, this Court invalidated a state statute providing textbooks to private schools

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County Board of Education, 51 Md. App. 312, 443 A.2d 622 (1982); *Cook v. Griffin*, 41 App. Div.2d 23, 364 N.Y.S.2d 632 (1975); *Epeldi v. Engelking*, 91 Idaho 390, 488 P.2d 860 (1971), *cert. denied*, 406 U.S. 957 (1972). The only decision to the contrary, *State ex rel. Hughes v. Board of Education*, 154 W.Va. 107, 174 S.E.2d 711 (1970), *cert. denied*, 403 U.S. 944 (1971), was overruled in *Janasiewicz v. Board of Education*, 299 S.E.2d 34 (W.Va. 1982).

[7] For that reason alone, *Widmar v. Vincent*, 454 U.S. 263 (1981) is wholly irrelevant to the issues in this case. *Widmar* involved a university's denial to a religious student group of facilities made available for all other student activities. The Court determined that the discrimination constituted an invalid "content-based discrimination against . . . religious speech", *id.* at 276, and did not decide the case under the Free Exercise Clause. *Id.* at 273 n.13.

practicing racial discrimination. It rejected the argument that the right to send children to private schools, recognized in *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), was "at stake," saying:

> "In *Pierce,* the Court affirmed the right of private schools to exist and to operate; it said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise."

Id. at 462.

Norwood also rejected a similar argument based on the alleged analogous right of state support for sectarian schools.

> Even as to church-sponsored schools whose policies are nondiscriminatory, any absolute right to equal aid was negated, at least by implication, in *Lemon v. Kurtzman,* 403 U.S. 602 (1971). The Religion Clauses of the First Amendment strictly confine state aid to sectarian education. *Even assuming, therefore, that the Equal Protection Clause might require state aid to be granted to private nonsectarian schools in some circumstances—health care or textbooks, for example—a State could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance.* . . . In the same way, a State's special interest in elevating the quality of education in both public and private schools does not mean that the State must grant aid to private schools without regard to constitutionally mandated standards forbidding state-supported discrimination.

Id. at 462-63 (emphasis added, citation omitted).

Thus, even if state aid were given to private schools generally, such aid could be withheld from sectarian schools in furtherance of the State's policy of church-state neutrality, just as the State could withhold tax-deductible status from private schools practicing racial discrimination in furtherance of the equal protection policies of the fourteenth amendment. *Bob Jones University v. United States,* 51 U.S.L.W. 4593 (U.S., May 24, 1983). In this case, IND. CODE § 20-9.1-7-1's provision of

transportation for parochial school students on an "existing route—space available" basis is narrowly tailored to conform with the admonition of IND. Const. art. I, § 6: "No money shall be drawn from the treasury, for the benefit of any religious or theological institution."[8]

Conversely, petitioners' claim of constitutional right to equal transportation services plainly could not be limited to sectarian schools of petitioners' particular religious persuasion because discrimination among religious beliefs is constitutionally impermissible. *Niemotko v. Maryland,* 340 U.S. 268, 272-73 (1951). Nor could such constitutionally required public support be limited to students attending sectarian schools, *see Everson,* 330 U.S. at 4-5 & n.2; *id.* at 20, 25-26 (Jackson, J., dissenting); *id.* at 61-62 (Rutledge, J. dissenting), because discrimination in favor of religion or sectarian schools is equally impermissible. *Meek v. Pittenger,* 421 U.S. 349, 362 n.12 (1975); *Torcaso v. Watkins,* 367 U.S. 488, 495 (1961); *Public Funds for Public Schools v. Marburger,* 358 F. Supp. 29, 37 (D.N.J. 1973), *aff'd,* 417 U.S. 961 (1974).[9] Thus, successful prosecution of petitioners' claim would divert away from public

[8] Similarly, numerous state courts have rejected the teaching of *Everson,* and have held public transportation of parochial school students invalid under comparable provisions of their state constitutions. *Epeldi v. Engelking,* 94 Idaho 390, 488 P.2d 860 (1971), *cert. denied,* 406 U.S. 957 (1972); *Spears v. Honda,* 51 Hawaii 1, 449 P.2d 130 (1968); *Opinion Of The Justices,* 59 Del. 196, 216 A.2d 668 (1966); *Board of Education v. Antone,* 384 P.2d 911 (Okla. 1963); *State ex rel. Reynolds v. Nusbaum,* 17 Wis.2d 148, 115 N.W.2d 761 (1962); *Mathews v. Quinton,* 362 P.2d 932 (Alaska 1961); *Visser v. Nooksack Valley School District,* 33 Wash.2d 699, 207 P.2d 198 (1949); *cf. McVey v. Hawkins,* 364 Mo. 44, 258 S.W.2d 927 (1953).

[9] Furthermore, all children attending private sectarian schools obviously do not do so for religious reasons, and a less than universal rule would require an at least undesirable and probably unconstitutional case by case inquiry into the individual's religious beliefs and motivation for attending a sectarian school. *See Bob Jones University v. United States,* 51 U.S.L.W. at 4601 n.30; *Widmar v. Vincent,* 454 U.S. at 269-70 n.6, 272 n.11.

education significant portions of their increasingly scarce financial resources, for it would necessarily require every school district in the country to provide for *every* private school the same transportation services provided for children attending the public schools.

Moreover, no limiting principle is available to confine petitioners' constitutional theory to the transportation services at issue in the case at bar. Squarely on the authority of *Everson*, for example, this Court held that public provision of textbooks for private sectarian schools does not violate the Establishment Clause. *Board of Education v. Allen*, 392 U.S. 236, 241-42 (1968). Adoption of petitioners' theory that the Free Exercise Clause compels what the Establishment Clause does not forbid would thus necessarily extend to textbooks and all other forms of public support that a State constitutionally may provide. It would therefore repeatedly inject state and federal courts into divisive religious disputes, such as those over the content of textbooks that the dissenters in *Allen* found so troublesome. 392 U.S. at 252-53 (Black, J., dissenting); *id.* at 254-65 (Douglas, J., dissenting); *id.* at 269-71 (Fortas, J., dissenting).[10] *See also,* Freund, *Public Aid to Parochial Schools,* 82 Harv. L. Rev. 1680, 1685-86 (1969).

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[10] The role of the local public school board is to decide whether to veto the selection made by the parochial school. This is done by determining first whether the text has been or should be "approved" for use in public schools and second whether the text is "secular", "non-religious," or "non-sectarian." The local boards apparently have broad discretion in exercising this veto power.

Thus the statutory system provides that the parochial school will ask for the books it wants. Can there be the slightest doubt that the head of the parochial school will select the book or books that best promote its sectarian creed?

If the board of education supinely submits by approving and supplying the sectarian or sectarian-oriented textbooks, the struggle to keep church and state separate has been lost. If the

Footnote continued on next page.

Petitioners' constitutional theory would at the same time undermine substantially that "local autonomy . . . long . . . thought essential both to the maintenance of community concern and support for public schools and to quality of the education process." *Milliken v. Bradley,* 418 U.S. 717, 741-42 (1974). Every decision by state and local officials with respect to "experimentation [and] innovation" in public education so as to "tailor local programs to local needs," *San Antonio Indep. School District v. Rodriquez,* 411 U.S. 1, 50 (1973), would have to be evaluated with a view to the possibility that a court would subsequently require the same or similar programs to be provided to all private schools out of public funds. And because that constitutional theory would narrow to a razor's edge "the channel between the Scylla and Charybdis [of the Religion Clauses] through which any state or federal action must pass in order to surwive constitutional scrutiny," *Thomas v. Review Bd. of the Indiana Employment Sec. Div.,* 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting), every Establishment Clause case would necessarily become in equal measure a Free Exercise Clause case as well. Thus, federal courts rather than state and local school officials would become the final authorities with respect to numerous "decisions with respect to the raising and disposition of public revenues [for local educational purposes]". *San Antonio School District,* 411 U.S. at 41.

The issues surrounding public taxation and support for private schools in comparison to the public schools are no less thorny and complex than those presented in *San Antonio School District,* and this Court's admonitions in that case apply with equal force to petitioners' claim here:

> In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of

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Footnote continued from previous page.

> board resists, then the battle line between church and state will have been drawn and the contest will be on to keep the school board independent or to put it under church domination and control.

392 U.S. at 255-56 (Douglas, J., dissenting) (footnotes omitted).

> educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgements made at the state and local levels. Education, perhaps even more than welfare assistance, presents a myriad of "intractable economic, social, and even philosophical problems." *Dandridge v. Williams,* 397 U.S. at 487. The very complexity of the problems of financing and managing a statewide public school system suggests that "there will be more than one constitutionally permissible method of solving them," and that, within the limits of rationality, "the legislature's efforts to tackle the problems" should be entitled to respect. *Jefferson v. Hackney,* 406 U.S., at 546-547. On even the most basic questions in this area the scholars and educational experts are divided. . . . Related to the questioned relationship between cost and quality is the equally unsettled controversy as to the proper goals of a system of public education. . . . The ultimate wisdom as to these and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues. In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.

Id. at 42-43.

Our system of free secular education as developed over the last one hundred and fifty years has served this Nation and most of its citizens well. *See* Freund, *Public Aid to Parochial Schools,* 82 Harv. L. Rev. at 1689-91. The current difficulties of that public education system, deriving from changing demographics, waning fiscal support and numerous other causes, are equally well known. The Constitution of the United States does not require that the federal courts contribute to those difficulties, and ultimately perhaps the demise of public education, by mandating public support for those who choose,

for whatever reason, to pursue a private route. *See id.* at 1687. Petitioners' claimed constitutional entitlement to public support would have to be provided to all private schools, and would be funded in large part, if not in whole, by diversion of public funds away from public schools. Therefore, in this case far more than in *San Antonio School District,*

> there is nothing simple or certain about predicting the consequences of massive change in the financing and control of public education.
>
> The complexity of these problems is demonstrated by the lack of . . . assurance that the poor, the racial minorities, or the children in over burdened core-city school districts would be benefited by abrogation of traditional modes of financing education. Unless there is to be a substantial increase in state expenditures on education across the board—an event the likelihood of which is open to considerable question—[the effect on] these groups . . . [is problematic at best].

411 U.S. at 56-57.

This Court has repeatedly held that a legislature's decision regarding the allocation of public funds is not constitutionally invalid merely because the result in some sense affects or indirectly burdens the exercise of a fundamental right. *E.g., Califano v. Jobst,* 434 U.S. 47 (1977) (marriage); *Dandridge v. Williams,* 397 U.S. 471, 483-87 (1970) (child bearing). And it only recently reaffirmed in the context of the Free Speech Clause of the first amendment those "scarcely novel principles" equally applicable to the instant case:

> We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny. *Buckley v. Valeo,* 424 U.S. 1 (1976), upheld a statute that provides federal funds for candidates for public office who enter primary campaigns, but does not provide funds for candidates who do not run in party primaries. We rejected First Amendment and equal protection challenges to this provision without applying

> strict scrutiny. *Id.*, at 93-108. *Harris v. McRae*, 448 U.S. 297 (1980), and *Maher v. Roe*, 432 U.S. 464 (1977), considered legislative decisions not to subsidize abortions, even though other medical procedures were subsidized. We declined to apply strict scrutiny and rejected equal protection challenges to the statutes.
>
> *The reasoning of these decisions is simple: "although government may not place obstacles in the path of a person's exercise of . . . freedom of speech, it need not remove those not of its own creation." Harris, supra*, at 316. Although TWR does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution "does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Id.*, at 318.

Regan v. Taxation With Representation of Washington, 51 U.S.L.W. 4583, 4586 (U.S., May 23, 1983) (emphasis added). Because the decision of the Court of Appeals applies those same principles to petitioners' claim under the Free Exercise Clause of the same amendment, and does so in conformance with the applicable decisions of this and all other federal courts, it does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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NO. 82-1713

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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ELIZABETH A. FRAME, ET AL.,

PETITIONERS,

VS.

SOUTH BEND COMMUNITY SCHOOL CORPORATION, ET AL.,

RESPONDENTS.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Petitioners respectfully submit this Reply to the Brief in Opposition filed by the Respondents pursuant to the Order of this Court.

Respondents' Brief emphasizes the importance of this case. It evidences a perspective, common in the era of

dwindling school enrollments, which will seriously impair the freedoms of school age children and their parents across the country if permitted to grow unchecked. However, in their Brief in Opposition, the Respondents have made several fundamental errors.

I. Providing Bus Service to Parochial School Children is Not Aid to Religion.

The Respondents characterize this case as involving aid to the parochial school itself (Brief in Opposition at 11, 14, 15, 16, 18). That was also the characterization of the Court of Appeals. However, as we noted in our Petition for a Writ of Certiorari, such a perspective is not compatible with the earlier holdings of this Court. Everson v. Board of Education, 330 U.S. 1 (1947).

This mischaracterization of this case

pervades the Respondents' Brief in Opposition and only obfuscates the true issues involved.

II. Indiana Statutes and the Equal Protection Clauses of the United States and Indiana Constitutions Do Require Respondents to Provide Parochial School Children With Equal Bus Service.

Respondents' characterization of this case cannot be squared with the action of the Indiana Legislature which, despite the state constitutional provision against the expenditure of funds "for the benefit of any religious or theological institution," IND. CONST., §6, has permitted its school corporations to offer transportation services to all children. However the matter may be viewed in other states,[1] consistent with

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1 The Respondents rely heavily on Missouri state and constitutional

its Constitution, the Indiana Legislature has given local school boards the power to provide school bus transportation, as a safety service, to all children who attend public and private schools.

Respondents have attempted to divert this Court's attention from Petitioners' equal protection claims by highlighting only one Indiana statutory section dealing with bus service to parochial school children (Brief in Opposition at 8) and then, in n. 3 of their response (Brief in Opposition at 10), claiming that Petitioners' reliance on all applicable Indiana Statutes is an attempt to manufacture a statutory claim to equal transportation service.

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law, which is wholly different from Indiana law (Brief in Opposition at 11-14) and, insofar as Petitioners' equal protection claims are concerned, those cases are irrelevant.

Crucial to Petitioners' equal protection claim are the very Indiana Statutes Respondents have tucked away in n. 3 of their Brief in Opposition. In these Statutes, the Indiana Legislature gives local school boards the option to provide bus service to school children. Ind. Code 20-9.1-2-1 (Appendix at 81a).

The term "school children" means all children enrolled in public or private school between kindergarten and grade 12. Ind. Code 20-9.1-1-4 (Appendix at 80a).

The term "private school" means any school not supported by tax funds. Ind. Code 20-9.1-1-3 (Appendix at 80a).[2]

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2 These Statutory sections, and others dealing with such things as surety bonds, bidding requirements and bus driver contracts, do not apply to private school busing programs. I.C. 20-9.1-2-29. These Statutes do, however, govern the actions of local public school boards.

Petitioners claim that once the Respondents elected to provide bus service to school children, they were required, under the Equal Protection Clauses of the Federal and State Constitutions, to provide the service to all school children as commanded by the Indiana Legislature, and they could not withhold those services from school children who, on the basis of religious belief, attend parochial schools.

Contrary to the position they now assert, the Respondents candidly admitted in the District Court that Petitioners' equal protection analysis was correct (Transcript at 46), but that their obligation to bus parochial (as opposed to private nonsectarian) school students was limited by I.C. 20-9.1-7-1 (Transcript at 46). Moreover, in spite

of their protestation that, in applying the Indiana Statutes, they are not discriminating between sectarian and other private schools (Brief in Opposition at 14), the Respondents admitted in their Brief filed with the Seventh Circuit Court of Appeals that the Indiana Statutes did compel them to provide equal bus service to school children attending public and private nonsectarian schools and to deny that service to only those school chidren attending religiously-affiliated schools! (Brief of Defendants-Appellees at 17, 21). Respondents now argue, without once claiming that a compelling state interest is being advanced, e.g., Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969), that it is constitutionally permissible under Indiana law to discriminate

between school children attending private, sectarian and private, nonsectarian schools as to the quality and extent of bus service they may provide (Brief in Opposition at 15-16).[3] This untenable position and admission as to how the Respondents interpret and apply the Indiana Statutes is reason enough to grant the Petition for a Writ of Certiorari.

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3 Respondents fail to explain why, under the Indiana Constitution, it is permissible to provide bus service to all private, nonsectarian school children and some private, sectarian school children, but unconstitutional to provide bus service to all private, sectarian school children. If aid to religion was truly at issue here (and it is not), then the number of children who receive the aid would be irrelevant -- aid in providing bus service to parochial school children would violate the Indiana Constitution regardless of the number of school children receiving the aid.

The question presented, therefore, is quite different from and a good deal narrower than the one suggested by the Respondents. Contrary to their submission (Brief in Opposition at 18, et seq.), this case does not raise the issue of whether every educational opportunity or innovation implemented by the public school system must be offered to private schools. Rather, it asks -- quite simply -- whether a public body, when it offers a safety service to its children pursuant to state statutes authorizing the service for public and private school children, may distinguish between them simply because of their choice -- or their parents' choice -- of a school.

III. Respondents' Actions Have Burdened Petitioners' Free Exercise Rights.

It ought not go unnoticed that

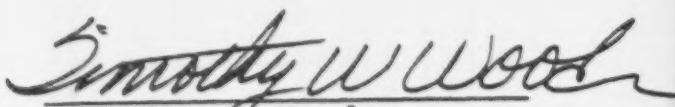
Respondents' mischaracterization of this case as involving assistance to the private schools rather than to the children who must travel to school is compatible with their declared motivation to burden those citizens who dare to attend the "competition." (Petition at 20-22). Indeed, the Respondents quite frankly allude to their preoccupation with "[T]he current difficulties" of the public education system (Brief in Opposition at 19). In South Bend, Indiana, as in other parts of the country, dwindling public school enrollments have meant fewer public schools -- and fewer public school jobs. However, local officials, concerned with the shrinkage of their domain, do not, under the Constitution of the United States, have the right to shore

up their economic position by denying individual citizens their Federal and State Constitutional rights.

Conclusion

For the foregoing reasons, and those previously asserted, Petitioners respectfully submit that their Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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